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AMERICAN LAW REGISTER.

JANUARY 1876.

THE POWER OF COURTS TO LET TO BAIL.

THE power to admit to bail, persons accessed of effences against the criminal laws, is one of the most important of the powers belonging to the courts. The power to bail is largely discretionary; and it is the purpose of this article to mark the limits which have been set to this discretion, and to present the practice of the courts, and the principles by which they have been guided in solving some of the most important questions connected with the exercise of this power.

By the early English common law, all offences, including traceon, murder, and other capital felonies, were bailable at the discretion of the court: 4 Bl. 298, 299; 2 Hale P. C. 120; Barney's Case, 5 Mod. 328.

By the Statute of Westminster 1, chap. 18, the power to bail, as to inferior courts and magistrates, was regulated and restricted. This statute did not, however, affect the Court of King's Bench. This court and its judges were left with full common-law jurisdiction upon the subject of bail: Courted, J., in Es parts. Barennet et al., 1 Ett. & Bl. 1.

By the common law, both before and after the Statute of Westminster, the power of the King's Beach and its judges to bail, was unquestioned in all cases. There was no limitation upon the exercise of this power, except that found in the practice and principles upon which the courts and judges proceeded, and by which they were guided. The power belonging to the English Court of King's Bench to bail in all cases, belongs equally to the courts of general jurisdiction in the states of this country, deriving their systems of jurisprudence from the common law of England, except as the same may be controlled or limited by constitutional or statutory provisions. This power is necessarily incident to the power to try, acquit, and finally discharge a prisoner.

In the exercise of this power, the English judges have been guided by a discretion "regulated according to the usage of law." The discretion was not exercised according to the caprice or individual judgment of each judge; it was a legal discretion, regulated by the rules and practice of the court, as contained and expounded in the adjudged cases: 1 Chitty's Crim. Law 128. The American courts have not departed from the principles of the English cases, and it will therefore be found that the practice upon this subject is as consistent and harmonious as upon any other subject of which the courts have cognisance.

The rules and practice of the courts upon this subject have been regarded by the English judges as of equal force with positive enactment; and it was because of an alleged abuse of discretion, and violation of the practice of the courts, in letting to bail John Eyre, that Junius, in his celebrated letter to Lord MANSFIELD, declared that the Lord Chief Justice was "degraded from the respect and authority of his office, and was no longer de jure Lord Chief Justice of England."

In all cases where applications are made to the courts for bail, the seriousness of the charge, the nature of the evidence in support of it, and the severity of the punishment awarded by law for the offence, are the chief considerations which influence the determination of the question. It was the constant practice of the English courts to refuse bail where the evidence created a strong presumption of guilt.

In Berennet's Case, ERLE, J., said: "The principle has been fully laid down already that where a crime is of the highest magnitude, and the evidence in support of the charge strong, and the punishment the highest known to the law, the court will not interfere to admit to bail. Where either of these ingredients is wanting, the court has a discretion which it will exercise."

In capital cases, where the presumption of guilt is strong, bail should rarely, if ever, be allowed; because no pecuniary considera-

that there was a strong probability of conviction, to appear for trial.

"All that a man bath will be give for his life;" and recognising this truth, the courts have seldom relaxed the rule that, in capital cases, it is safest to deny bail where there is a strong probability of the prisoner's guilt.

"Ball is only proper where it stands indifferent whether the party is guilty or innocent of the accusation against him, as it often does before the trial; but where that indifference is removed it would be absurd to buil: "Hawkins, book 2, chap. 15, sect. 20. This rule is approved in Taylor's Case, 5 Cowen 89, and in The People v. Goodsein, 1 Wheeler's Cr. Cases 158. In the latter case, Sutherland, J., says: "I have found no case at war with Hawkins."

In the case of Commonwealth v. Keeper of Prison, 2 Ash. 284, a practical and safe rule is given. "It is difficult," says the court, "to lay down any precise rule for judicial government in such a case; but it would seem to be a safer one to refuse ball in a case of malicious homicide, where the judge would sustain a capital conviction pronounced by a jury, on evidence of guilt such as that produced on the application for bail, and to allow bail where the prosecutor's evidence was of less efficiency." The court ought not to look further than to the nature of the offence and the strength of the evidence in support of it. Neither the character of the prisoner, nor his relations or situation in life, can be looked to in determining the probability of his appearing for trial: In re Robinson, 28 L. J., Q. B. 286.

Upon the question, whether the court can go behind the indictment, on an application for a habeas corpus to secure bail, the practice in the American courts is not uniform.

The practice in the English courts is to refuse to hear proof to rebut the presumption of guilt created by an indictment. And this practice is followed in many of the American courts. Upon the application of Asron Burr for bail, after indictment, Chief Justice Marshall refused bail, and thought proof to rebut the presumption raised against the defendant by the finding of the grand jury inadmissible, although before indictment be had admitted the prisoner to bail. The same rule was followed in the case of The United States v. Jones, 8 Wash. C. C. 224.

In the case of Hight v. The United States, 1 Moerie 407,

fore a person shall be punished as criminal, he must be found guilty by two independent juries. The verdict of the first ruises a full presumption of guilt up to the time of his trial before the second."

The same practice was followed in The State v. Mills, 2 Dev. 421, and in Beneit's Case, 1 Martin (La.) 142. In the case of Hight v. The United States, it was said that the provision of the ordinance of 1787, which declares that "All persons shall be bailable, unless for capital offences, where the proof shall be evident or the presumption great," is merely declaratory of the common law of the United States; and that the indictment of a grand jury furnished the proof and created the presumption which authorised the refusal of bail.

In Indiana, since the decision in the case of Lumm v. The State, 8 Ind. 298, the practice has been to hear the evidence, after indictment, and to let to bail upon proof that the prisoner was guilty of a bailable offence, or upon his showing that the " proof was not evident, or the presumption strong" that he was guilty of a nonbailable offence. This practice has been adopted in many of the other states: Exparte Wray, 80 Miss. 678; State v. Simmons, 19 Ohio 189. Under this practice the court will hear the evidence and from it determine whether the presumption created by the indictment is overcome by the facts presented; if so, bail will be allowed; but if not, the presumption remains and bail must be refused. The indictment is not left out of view in this investigation. but furnishes in the first instance the full presumption of guilt. If a person is indicted for a non-bailable offence, and applies for bail, but refuses to offer any evidence, the result must be precisely what it would be in those courts where evidence will not be heard after the accused is indicted; bail must be denied, and upon the ground that the indictment furnishes a strong presumption of guilt. The burden is upon the prisoner to show that he is entitled to ball: Heffrin's Case, 27 Ind. 88.

If the evidence adduced neither strengthens or impairs the presumption created by the indictment, there can be no doubt as to the course to be pursued; the presumption would remain; it would be strong and bail ought to be refused. After indictment it is not a question of guilt or innocence absolutely, and the same certainty of guilt is not required before refusing bail, that would be required to convict: Street v. The State of Mississippi, 9 Am. Law Reg. N. S. 749. It has been thought that the dis-

tion whether the "proof is evident or the presumption strong." In Goodwin's Case, supra, this was considered as supporting an inference in favor of the prisoner's innocence. In Summon's Case, 10 Ohio 189, the application for bail was upon this ground alone; and it was denied that it was an independent ground for bail.

It is evident that the effect of the disagreement of a jury upon the question of letting to bail, must depend materially upon the grounds of disagreement. The disagreement may have been caused by the captiousness or obstinacy of one jurer. The Spanish have a proverb, that a man had "better be a fool than be obstinate;" and a disagreement caused by obstinacy, would be of no value whatever in determining the question of bail. The disagreement may have been as to some matter of law. And although the jury may determine the law, it could not be seriously contended that a difference of opinion among the jurors as to the law, would be entitled to any consideration by the court in trying the question of bail. If the court was informed that the disagreement grew out of an intelligent and conscientious difference of opinion in relation to matters of fact proper to be considered by the jury, then such disagreement might properly be considered as creating an inference in favor of the prisoner, but otherwise the disagreement of a jury is certainly a fact of no value upon the question of bail. In some exceptional cases bail has been allowed, for special reasons, unconnected with the question of probable guilt or innocence, before and after conviction: Rez v. Bishop, 1 Strange 9; Commonwealth v. Semmes, 11 Leigh 665; Commonwealth v. Archer, 6 Grattan 705; Es parts Dyson, 25 Miss. 859.

Under provisions similar to that contained in the ordinance of 1787, some courts have thought the power to bail was taken away, if the crime was capital, and the proof evident or presumption great. (See 2 Ash. 227.) On the contrary it has been distinctly held that the discretionary power, otherwise possessed by the courts, remains, even if the crime and its punishment are the highest known to the law, and the proof evident: 30 Miss. 678. This is certainly the better opinion, as the provision referred to is but declaratery of the common law, and at common law the power was admitted and cometimes exercised; 12 Mod. 66; 5 Id. 238. In Indiana this discretion is taken away by the following previates of the Constitution of 1882: "Murder or treason shall not be bail-

In some of the states it is provided by statute that a prisoner shall be entitled to bail, if, without just ground therefor, the prosecutor allows a term to pass without trial. But bail cannot be claimed as a matter of right for this cause when no such statutory prevision exists. Delay in bringing on the trial, on the part of the prosecutor, without just cause, might be sufficient ground to induce the court to exercise the discretionary power of admitting to bail. But the circumstances must be very strong to induce the court to allow bail for such a cause: 8 Wash. 224.

THOS. F. DAVIDSON.

RECENT AMERICAN DECISIONS.

Court of Chancery of Delaware.

JAMES E. CLAWSON v. JOSEPH PRIMROSE.

The English doctrine of presumptive title to light and air received over land of another person, arising from the uninterrupted enjoyment of it for twenty years and upward, through the window of a dwelling-house, was part of the common law of England and of the colonies at the period of American Independence, and as such continued to be the law of Delaware under the constitution of the state adopted at the organization of the state government in 1776.

A court of equity will restrain the obstruction of lights by erections on adjoining land, even where the right is unquestioned or established, only when the privation of light and air by a proposed erection will be in such degree as to render the eccepation of the complainant's house uncomfortable, if it be a dwelling-house, or if it be a place of business, the privation must render the exercise of the business materially less hencicial than it had formerly been.

A fair test of what is such a privation of light, etc., is the fact that a jury would give substantial and not morely nominal damages.

Construction of that clause of the Constitution of 1776, declaring the common law of England to be in force in this state.

Principles for determining what parts of the English common law are inapplicable in this country.

BILL in equity. The complainant was the owner and occupier of a dwelling-house, situated in the town of Smyrna, and adjoining, on the northerly side, an unimproved lot of the defendant. In the complainant's house were several windows overlooking the defendant's lot, through which light and air were received into the house. At what precise time these windows were opened, did not appear; but it was proved that they had been in their present condition, and used by the successive owners and occupiers of the dwelling-house, for a period of over thirty-five years past. The

defendant being about to remove a frame tenement to the lot, and to locate it against the northerly side of the dwelling-house, so as wholly to darken the windows, the bill was filed for an injunction to restrain the proposed obstruction. The material facts touching the precise location of the windows and the effect of the obstruction, are stated in the opinion of the chanceller.

J. Alexander Fulton, for the complainant.

George V. Massey, for the defendant.

The opinion of the court was delivered by

BATES, Chancellor.—Two preliminary objections were taken to the relief sought by the bill. One of them was this: that even concerling to the complainant the right claimed to receive light and air over the defendant's let, yet that the proposed obstruction will not impair his enjoyment of the dwelling-house in such degree as to warrant the interference of a court of equity, but that he should be left to seek redress in damages at law. The rule on this point, as first announced by Lord ELDON, in Atterney General v. Nichel, 16 Ves. Jr. 887, and followed in all subsequent cases, is, that a court of equity does not in all cases restrain the obstruction of lights by erections on adjoining land, even though the right is anquestioned or established, but only when the privation of light and air by a proposed erection will be in such degree as to render the occupation of the complainant's house uncomfortable, if it be a dwelling-house, or, if it be a place of business, the privation must render the exercise of the business materially less bene-Scial than it had formerly been: Wynetenly v. Lee, 2 Swanet. 358; Sutton v. Lord Montfort, 6 Eng. Ch. R. 257; Dont v. Austion Mart Co., L. R. 2 Equity Cases 288. In the latter case, Sir WM. PAGE WOOD, V.-C., enables us, by an easy test, to determine what is such a substantial privation of light and air as should induce this court to relieve. He says "that where substantial damages would be given at law, as distinguished from some small sum of 5/., 10% or 20%, the court will interpose; and on this ground, that it cannot be contended that these who are minded to erect a building that will indict injury upon their neighbor have a right to purchase him out without an Act of Parliament for that purpose having been obtained."

In the present case, the threatened obstruction, if the complainant's title be conceded, is sufficient, within the rule, to be the

subject of equitable relief. The windows on the north side of the house overlooking the defendant's lot will be wholly closed. One of these is in the cellar, and without this window there could be no means of lighting and airing the cellar. Another window is in the kitchen, at the rear of the dwelling. The kitchen would be left with one window on the opposite or south side. Another window is in the attic, at present the only window in that part of the house, though a witness states that other arrangements might be made for lighting that part of the house.

Another, and the most important of the windows threatened, is on the north side of the dining-room. There is no window on the south side of the dining-room opening out of doors. There was such a window in former years opening into a covered porch, but some sixteen years since the porch was enclosed and made a part of the interior of the house. It so remains. Mr. Stockley, who essupied the house before the porch was enclosed, testifies that, even with the south window opened as it then was, the room could not be comfortably lighted or ventilated without the north window, the porch having a roof so low and wide as to admit but little light and air. It must be sufficiently apparent that the obstruction of these windows will very materially impair the complainant's enjoyment of his property.

But it is objected further that the complainant, having an open space on the south side of his house, can by other arrangements supply the deficiency of light and air, and that there is therefore no necessity for the interference of the court. Without stopping to inquire whether adequate arrangements of that kind could be made, it is enough to say that such a consideration is not admissible to affect the right of the complainant to enjoy his property after the manner in which he previously held it. If the English doctrine of ancient lights be our law, and the complainant has by twenty years' user acquired a title to this servitude, most clearly the title gained is the right to enjoy his dwelling as he has so long held it, and he cannot he compelled to alter his house so as to suit the convenience of his neighbor. This principle has been recently adjudged by V.-C. Sir WM. PAGE WOOD, in the case of Dent et al. v. The Austien Mart Co., before cited. There the injunction was sought against the erection of a house at some short distance from the complainant's house, the effect being partially to darken a window, and one of the defences was that the complainant could the state of the s

1

not sustained. "The complainants," says the V.-C., "are clearly entitled to retain the right as they acquired it, without being compelled to make any alterations in their house to enable other people to deal with their property." I have found no other case on this point in England or in America, though after diligent search.

We are then brought unavoidably to the main question in contreversy, viz.: whether in this state the uninterrupted enjoyment, by the owner of a tenement, of light and air received laterally over the land of another for more than twenty years, raises a title to the future unobstructed use of the same.

Incorporated rights generally—such as ways, water-courses, &c.—are the subjects of presumptive title, arising from twenty years' adverse user, by analogy to the statute limiting entries into lands, and that both in England and in this country. In England this general doctrine of presumptive title to incorporeal rights or casements includes, as one of them, the enjoyment of light and air. Does the law of presumptive title in this state, in like manner, extend to light and air? That is the question.

A careful reading of all that could be found to bear upon the subject, with much reflection, leads me irresistibly to the conclusion, that the doctrine of presumptive title to light and air from twenty years' enjoyment, as it was held in England prior to the statute of 8 & 4 Will. IV. (which simply converted the presumption of title into an absolute bar), was a part of the common law of title to real estate in England at the period of our separation from that country, and that by force of the constitution of this state, adopted in the year of its independence, that doctrine became the law of this state, subject only to alteration by the legislature.

The Constitution of September 20th 1776, adopted upon our separation from England and organization into an independent state government, provides, by art. 25, that "the common have of England, as well as so much of the statute law as has been herotefore adopted in practice in this state, shall remain in force, unless they shall be altered by a future law of the legislature, such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights, &c., agreed to by this convention:" I Delaware Laws, Appendix, p. 89.

The object of this clause was to secure to the people, in their

transition from a colonial to an independent political state, a jurisprudence already complete, and adequate immediately to define
and to protect their rights of person and property, and of citizenship generally, without awaiting the slow growth of a new system
to be thereafter matured by legislation and judicial decisions.
They had already, in their colonial state, as subjects of Great
Britain, an established jurisprudence in the common law of England. It was a system of jurisprudence to which our ancestors
of that day were deeply attached. They had esteemed it, throughout their colonial condition, to be their birthright, as English
subjects, and their safest rule of conduct, so declaring it in several
legislative acts. See Preamble to Act of 1719, 1 Del. Laws 64.

This attachment to the common law pervaded all the colonics. The Congress of 1774, in its enunciation of certain fundamental rights and immunities, which were claimed for the American subjects of Great Britain, placed among the foremost of them the declaration that they were entitled to the common law of England, as also to such English statutes as were in force at the date of their colonisation, and which, by experience, they had found applicable to their circumstances: 1 Story's Constitution, sect. 158, n.

The provision of our state constitution of 1776, adopting for the new state government the body of the common law, and in part the statutes of England, is the same in substance with the declaration of the Congress of 1774 of what had before been held to be the force of the English common and statutory law in the colonies; and the obvious purpose and effect of the 24th article of the constitution were to give to the common law in this state, by constitutional adoption, the same force under the new government which, in their previous political condition, it had by virtue of their colonial relationship to the mother country. By the common law was of course meant the common law of England as it then stood, so far as it was applicable to the circumstances of the people, and was not repugnant, as the constitution expresses it, "to the rights and privileges contained in that instrument and the declaration of rights."

We now come to the two principal questions raised by the argument, vis.:—

1. Whether the English doctrine of a presumptive title to light and air from twenty years' enjoyment, by analogy to the statute of 21 James I., was part of the common law of England prior to

2. If so, whether, under our state constitution of 1776, it became the law of this state.

First, then, was the English doctrine part of the common law prior to 1776?

It has sometimes been spoken of as a modern doctrine. Its origin has been referred to two or three judicial decisions made between the year 1761 and 1786, viz: Lowie v. Price, Dangel v. Wilson and Derwin v. Upton. Even were these cases taken to have first incorporated the doctrine into the English common law, they would carry it back to a period anterior to our state constitution of 1776. But it will be strictly correct to say that the English doctrine is in its principle a very ancient one. The principle is that uninterrupted user raises a prescriptive title to incorporeal rights and to the servitude of light and air as one of these incorporcal rights. This has been a principle of the common law from the beginning. It is true that the prescriptive period, or the duration of the user requisite to raise the prescriptive title, has been modified several times in the lapse of the last three centuries, but the principle of prescriptive title has all the while been the same. The last change of the prescriptive period, that which reduced it to twenty years by analogy to the Statute of James, was adopted long prior to the American Revolution, and from the time of its first adoption by judicial decision applying it to any species of incorporcal rights, it became the law of all such rights, and among them, of the servitude of light and air, before even the cases just referred to for its actual application to this particular servitude had occurred. This is but a general view of the subject. Let us examine, as briefly as can be done intelligibly, the grounds on which it rests. They may be reduced to three well established facts of judicial history.

First. It is beyond any doubt whatever that the ancient common law of presumptive title to incorporeal rights founded on immemorial user, included and protected the enjoyment of light and air as one species of such incorporeal rights. This was held to be settled law as far back as the 28th Elizabeth, in Bland v. Manly, sited in Aldred's Case, 9 Co. Rep. 68. That was an action at law for the obstruction of the lights of a dwelling-house alleged in the narr. to have been enjoyed from time immemorial, i. e., time whereof the memory of man runneth not to the contrary, which was the prescriptive period them in force. The obstruction was

The Court of King's Bench sustained the action bolding the prescription from time whereof the memory of man runneth not to the contrary, sufficient to raise a presumption that originally there had been a grant of the privilege of having the windows unobstructed. Following this case and extending through the long interval which chapsed before the prescriptive period was finally reduced to the present limitation of twenty years by analogy to the Statute of 21 James I., there were many cases, which though they did not all directly adjudge a title to light to have been sequired by the user, set up in the particular case, nevertheless fully recognised the servitude of light and air as being equally and alike with all other incorporcal rights and casements the subjects of a prescriptive title: Pope v. Berry (29 & 30 Eliz.), Cro. Eliz. 118; Leon. 168; Palmer v. Fletcher (15 Car. II.), 1 Levinz 122; Villiers v. Ball (1 W. & M.), 1 Show. 7; Rosewell v. Pryor, (2 Anne), 6 Mod. 116; 2 Salk. 459; 1 Ld. Raym. 892. see beyond any question that the rule of prescriptive title as to incorporeal rights, as at first settled in the common law, protected, as one of those rights equally and on precisely the same footing with others, the one now under consideration.

But here we meet the fact that the ancient law of prescription has undergone several successive modifications, and that the present inquiry is not whether the servitude of light and air was protected by the common law of the reign of Elizabeth, but whether by the latter rule of title presumed from twenty years' possession by analogy to the Statute of James I.

Second. This brings us to observe a second fact in the history of this subject, which is that under the several successive modifications of the English law of prescriptive title, commencing with the most ancient rule of prescription from immemorial user up to and including the comparatively modern rule of presumptive title from twenty years' enjoyment, by analogy to the Statute of James, the rule, however modified at any period of its history, continued to be applied as well to the servitude of light and air as to any other species of incorporeal rights. The modifications undergone were not such as to narrow at all the scope or application of the rule of prescriptive title, so as to exclude at any period a species of incorporeal right which had previously been protected, but their whole operation was simply to reduce from time to time the period of prescription so as to conform it to the limitations in force for the

and see if such was not the true purpose and effect of the successive changes in the law of prescriptive title.

The policy just stated, of conforming the period of prescription to incorporeal rights with the statutory limitation for real actions, so as to give uniformity to the mode of acquiring possessory titles to both species of real estate, has obtained from the earliest times. Thus when by the Statute of Westminster 2, ch. 46, 8 Edw. I., the coronation of Richard I. was fixed as the period of legal memory within which a seisin must be proved in order to maintain a writ of right, it was from thenceforth adopted as the convenient period of legal memory for all purposes and became the prescriptive period for acquiring title to incorporcal rights as well as to lands. So stood the rule until the Statute of 82 Heary VIII. fixed a progressive period of limitation, sixty years, for write of right. After this time, although, as it seems, the period of Richard's reign continued to be nominally adhered to as the beginning of legal memory for the purpose of working an absolute bar, yet in analogy to the Statute of Henry VIII., sixty years' possession came to be considered as sufficient evidence of an enjoyment from the reign of Richard I., so as to raise a title, unless rebutted by proof that the possession or user commenced subsequently to his reign. As such proof could rarely be made, the sixty years became practically the measure of legal memory. Thus the law stood until the Statute of 21 James I., which limited entries into lands to twenty years. It was by analogy to this statute that twenty years was afterward adopted as the requisite period of user for raising a presumptive title to incorporeal rights, with this difference, however, that whereas, under the statute, twenty years' adverse possession of land

There is some confusion in the different writers' statement of the law of this period, some holding that the ancient period of legal memory, i. e. from the beginning of the reign of Richard I., continued, unaffected by the Statute of 32 Henry VIII ? 2 Wend. Black. 31, n. (21); while others considered that this statute was equitably extended to incorporeal rights as had previously been the Statute of . Westminster, ch. 20; Gole & Whatley on Exempets 64-5. The probable solution of this apparent disagreement of authorities is, that for the purpose of working a conclusive bor, the reign of Richard I. was adhered to as the beginning of legal memory; but that the Statute of Henry VIII. limiting write of right to rixty years, was so far extended, as to make the enjoyment of an incorporal right for that length of time evidence sufficient, if unrobutted, to prove such enjoyment had commenced as far back as the reign of Richard I. As the robutting proof could revely be made, the sixty years' possession prestically became the measure of immemorial user, and thus was sufficient to reice a title though a presumptive one

worked an absolute bar, the twenty years' enjoyment of an incorporeal right was held to raise only a presumptive title by grant which might be rebutted: 2 Wms. Saund. 175, note (2); 2 Wend. Black. 266, note (10): 1 C., M. & R. 217; Gale & Whatley on Easements 65. And so the rule stood until the Statute 3 & Will. III., which in effect converted what before was only a presumptive title into an absolute bar, fixing for the first time different periods for different classes of easements; among the rest fixing twenty years, as the period for raising a title to light and air. Baron Parks in 1 C., M. & R. 217.

Third. We come now to notice a third point in the history of this subject, which will show quite clearly that the rule of presumptive title from twenty years' possession to the servitude of light and air was part of the common law many years prior to the American Revolution. The point is this: that whenever the rule of presumptive title from twenty years' possession by analogy to the Statute of James was adopted for incorporcal rights generally. 'it became thenceforth, by its own force, the law of title to light and air as one species of incorporeal rights, without awaiting the occurrence of an adjudicated case of the application of the modi-Sed rule to these particular rights; otherwise we should have this result, that while a title to some kinds of incorporeal rights might be gained by twenty years' enjoyment by analogy to the Statute of James, others, or at least one species, that of light and air, would remain under the old doctrine of immemorial presumption requiring a period of sixty years. And thus the very principle upon which the analogy of the Statute of James was adopted, vis.: to give uniformity to the term required for raising possessory titles, would fail at the point where it was of most value: for certainly such uniformity of title is more important among different kinds of incorporeal rights themselves than as between incorporeal rights and lands—clearly then the very principle upon which the equitable extension of the Statute of James proceeded, necessarily made it applicable from its first adoption to every species of incorporeal right. Every statement or explanation in the books, of this rule of analogy to the Statute of James, will be found to give it this bread and unqualified scope. So Lord MANSFIELD puts it when he says that "an incorporcal right," i. c., any incorporcal right, "which if existing must be in constant use ought to be decided by analogy to the Statute of Limitations:" Gale & Whatley 66. And Mr. Sorgennt Williams, hardly less an authority on such

subjects, in his note to Yard v. Ford, 3 Wms. Saund. 175, in his explanation of the ground of the change, shows at the same time its scope and its uniform application to all incorpored rights of every description.

We are now prepared for the direct question: when did the present English doctrine of presumptive title to light and air from twenty years' enjoyment become a part of the common law? The answer is, that whenever the uncient prescriptive period of immemorial user, measured at first from the reign of Richard I., as a fixed period, and afterward by sixty years, was abandoned as to immemorial rights finally, and in lieu of it the rule of twenty years, by analogy to the Statute of James, was adopted by judicial decisions, which applied the modified rule to any incorporeal right whatever, it became thenceforth the law of all incorporeal rights, and as well the law of title to the enjoyment of light and air as to any other species of right. For the rule of analogy when applied to the first species of incorporeal right, which called for its application, was adopted as the law of the whole and thus became by judicial decision the law of the whole.

At what time, we may then inquire, was the equitable extension of the Statute of James admitted as to any incorporeal right? The precise date it is not easy to determine. So great a reduction of the prescriptive period as from sixty years to twenty years, the courts, in the conservative spirit of that age, were slow to sanction; and through several reigns following that of James I., the cases proceed upon the old doctrino of immemorial user. It was not until early in the eighteenth century that, pressed by the inconvenience and often impossibility of proving an enjoyment beyond legal memory, even after sixty years had become the measure of such legal memory, and also yielding to the importance of a reusenable uniformity in the law of possessory titles to real estate, the courts admitted the equitable extension of the Statute of James to incorporcal rights, so far as to hold twenty years' possession to be not a bar, but presumptive only of an original title by grant. It is certain, however, that this extension of the statute was adopted and fully incorporated in the common law of England prior to American Independence. The cases, though not numerous, are decisive. One case will serve to show that the presumption of title from twenty years' enjoyment of an incorporcal right was the common law rule as early as 1722, fifty years before our independence: Keymer v. Summers, Buller's N. P. 74; 8 Wms. Saund.

175 5. The question there concerned a right of way over an adjoining close claimed by the plaintiff under a deed for a tenement "with all ways therewith used," the deed being executed by a third person not a party to the suit. The deed was made in 1758. The plaintiff's grantor had, in fact, as far back as 1728, leased the adjoining close to the defendant for three lives without any reservation of the way. Nevertheless, the plaintiff's grantor had from 1728 to 1758 exercised the right of way without obstruction; and the point decided was that this user for twenty years raised in the grantor a presumptive title to the right of way sufficient to pass by his deed made in 1758.

Thus far we have considered the question as though no judicial decision holding this particular servitude of light and air to be within the rule of analogy to the Statute of James had occurred prior to 1776, and even had no such case occurred before that date we should be obliged to hold the doctrine as having been then a part of the common law. But it does certainly appear that before the period of our separation from Great Britain, cases for the application of the new term of twenty years' presumption by analogy to the statute, of light and air, did occur, and the courts without any doubt or hesitation held that the rule long before settled as a general one, extended to this species of incorporeal right. This was done in a series of cases, both in the King's Bench and Common Pleas. These are Lewis v. Price, in 1761, Dougal v. Wilson, in 1769, and Darwin v. Upton, in 1789, all reported in 8 Wms. Saund. 175, n. 8. The first two of these cases were prior to our independence, but no great stress need be laid on that fact. For, according to the true force of these decisions, they are to be taken not as introducing a new rule operating from their date, but rather as judicial declarations of the law previously in force. In this view, that is, as judicial evidence of what the law had been on this point, Derwin v. Upton, also, though decided in 1789, a few years after American Independence, is of equal force with the two cases prior to 1776; and of great value indeed is that decision as a confirmation of the prior cases; for it was a decision by the Court of King's Bench sitting in banc and upon much consideration. It is worth while to examine these cases together: Lewis v. Price, in 1761, was an action on the case for obstructing the plaintiff's lights. The plaintiff's enjoyment of the obstructed lights extended back forty years, less than the old proeventive nation of eight warm maining notice to the Statute of James. Yet WILMOT, J., held that the action would lie, stating the rule as then understood thus: " that twenty years is sufficient to give a man a title in ejectment on which he may recover the house itself, and he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house." This effect of the enjoyment for twenty years and upward, he says, " is founded upon the same reason as when the lights have been immemorial, for this is long enough to induce a presumption that there was originally some agreement between the parties." In Dougal v. Wilson, in 1769, which came before the same judge sitting as chief justice, there had been a possession of a house with lights from fifty to sixty years. He held that it could not be disturbed, but not resting his decision upon the length of enjoyment in that case, for he expressed his opinion to be, that "a much shorter time than sixty years might be sufficient," clearly referring to the modification of the old rule of prescription, after the Statute of James, as embracing lights.

Then comes Darwin v. Upton, in 1789, in which the question came before all the judges of the King's Bench. The plaintiff, upon no other title than twenty-five years' enjoyment, brought his action for the obstruction of light, and he recovered before Gould, J. at Nisi Prins. The case came before the court in bane upon a rule for a new trial for misdirection to the jury, by Justice Gould. It should, however, be observed that under the rule for a new trial no question whatever was made in that case, as to the application of the rule of twenty years' possession to the case of lights, but the exception taken was that the judge had instructed the jury that the lapse of time constituted an absolute bar not to be rebutted, the defendant's counsel admitting that the twenty years' possession raised a title, but as he insisted a presumptive title only, subject to be explained away. The judges in bane, in opinions expressed seriation, held such to be the law, and upon explanation by the justice who tried the case that such was the meaning of his instruction to the jury, the court discharged the rule. Says Lord MANSFIELD, " the enjoyment of light with the defendant's acquicecence for twenty years, is such decisive presumption of a right by grant or otherwise that unless contradicted or explained, the jury eaght to believe it." Though, he adds, not an absolute ber, "it is certainly a presumptive bar which ought to go to a jury." I have before said that Darwin v. Upton, though decided shortly

after our independence, introduced no new rule as to lights, but was declaratory that the law of presumptive title from twenty years' possession, which had long before been applied to other incorporcal rights, equally embraced this one of them. Now, this view is clearly implied in the language of all the judges. For Lord MARS-FIELD, and Justices WILLES and BULLER, cite prior instances of the application of the rule to several kinds of easements as controlling the case of lights. And, besides, the possession on which the plaintiff in Darwin v. Upton recovered, and which consequently was held to be under the operation of the rule of presumptive title, commenced before 1776, as it was a possession of twenty-five years prior to 1789; so that the recovery necessarily assumed the rule to have been a part of the law prior to 1776. It need only be added that Darwin v. Upton, as a case truly declaratory of the common law then settled on this subject, has been recognised in the later English cases, as by BULLER, J., in Read v. Brookman, 8 T. R. 159, and by BAILEY, J., in Cross v. Lewis, 2 B. & C. It is difficult indeed to see how, in the face of such a judicial history, it can be doubted that at the period of-our independence as a state, what is termed the English doctrine of presumptive title to light from twenty years' enjoyment, was a part of that common law which as an entire body or system, the constitution of 1776 was so careful to continue in force.

Secondly. We must now return to the constitutional provision of 1776, and inquire whether by force of it, what we have seen to be the common law doctrine of ancient lights at the date of the constitution, became the law of this state. It cannot be overlooked that notwithstanding the broad language of the constitution, there were many parts of the common law of England, as it stood prior to 1776, which never have in fact been regarded by our courts as of force in this country: yet it is to be observed that the courts have not herein acted arbitrarily in adopting some parts of the common law and rejecting other parts, according to their views of the policy of particular rules or doctrines. On the contrary, those parts of the common law of England, which have not been here practically administered by the courts, will be found, on examination, to reduce themselves to two classes, resting upon grounds which render them proper to be treated as implied exceptions to the constitutional provision, in addition to the expressed exception of such parts of the common law as " were repugnant a and mutation andainad in aba a

One of these classes of exceptions may be briefly disposed of. It embraces those parts of the rules and practice of the common law which had become superseded by long-settled usages of trade or business, or habits of dealing among our people, such as could not be unsettled or disturbed without acrious inconvenience or In such cases, upon the necessary maxim that communic error facit jus, the courts accepted these departures as practical modifications of the common law. Many illustrations of this class might be given, such as the use of an ink scroll instead of wax and paper to constitute a seal; and such is the explanation of our long practice of allowing stays of execution without prejudice to the lien of a levy upon goods, a practice unknown at common law. Such instances are very numerous and need not be further referred to. But on the subject before us, there has certainly during the century which has almost elapsed since our independence, been no known usage or custom, no general course of dealing or acting among our people, nor any apparent understanding of the law inconsistent with the rule of a presumptive title by user to light and air, as well as to other incorporcal rights, so that the enforcement now of such a rule would unsettle or disturb titles acquired or supposed to be acquired upon the faith of a different state of the law. On the contrary, the general rule of presumptive title from twenty years' user of incorporeal rights by analogy to the Statute of James I., of which the doctrino of ancient lights is but one of the applications, has always been received and frequently adjudged in our courts as part of that common law which was adopted under the constitution of 1776. It so happens that no case has arisen for the application by the courts to light and air, of the general rule of prescriptive title, but it exampt be doubted that so far as our people have acted in matters of title with any view to the state of the law on this question, they must have naturally presumed that the rule of analogy to the Statute of James I., having been adopted from the common law and applied by the courts to such cases of incorporcal rights as had arisen for judicial decision, was adopted, not in some only of its applications at common law, but as to all. And thus we see that it is by now rejecting, and not by applying the doctrine of ancient lights, that past transactions and titles heretofore acquired or supposed to be acquired would be unsettled and prejudiced.

We pass then to the other class of rules which, though parts of

bourts under the constitution of 1776. This class embraces these parts of the common law which in the terms usually employed were at the period of our independence inapplicable to the existing circumstances and institutions of our people. This was a well-understood limitation upon the extent to which the colonies were considered to have carried with them the laws of the mother country (1 Black. Com. 108; 1 Story on Cons., sect. 148); and without doubt the same limitation, though not expressed, attached to the provision of the constitution of 1776. But this limitation will not be found to touch the present subject. There is less difficulty in applying the limitation practically than in attempting to define it. I understand it as excluding those parts of the common law of England which were applicable to subjects connected with political institutions and usages peculiar to the mother country, and having no existence in the colonics, such, for example, as offices, dignities, advowsons, tithes, &c.; also, as excluding some of the more artificial rules of the common law, springing out of the complicated system of police, revenue and trade, among a great commercial people and not therefore applicable to the more simple transactions of the colonies or of the states in their early history: also it may be understood as excluding or modifying many rules of what is known as the common law of practice and possibly of evidence, which the greater simplicity in our system for the administration of justice would render unnecessary or inconvenient.

But, on the other hand, our early legislative and judicial history shows conclusively that what may be termed the common law of property was received as an entire system, subject to alterations by the legislature only. Rights of property and of persons are fundamental rights necessary to be defined and protected in every civil society. The common law, as a system framed to this very end, could not be deemed inapplicable in the colonies for want of a subject-matter, or as being needless or superfluous or unacceptable, which is the true sense of the limitation in question. Certain it is, as a matter of history, that our ancestors did not so treat it. Perhaps no branch of the common law was adopted in this state so entire as this law of real estate, the whole body of which, with all its rules for defining the nature and quantity of estates in lands, for prescribing the modes of acquiring title to them, and for regu-' lating their transmission was, from the beginning, administered by our courts enhatentially as in Kngland, with each modifications

only as were made from time to time by the legislature. And we a part of the common law of real estate the rule of presumptive title to incorporeal rights from twenty years' user, by analogy to the statute limiting entries into lands, has been received as the law of this state from the beginning, and frequently applied to other kinds of incorporeal rights, no case of lights before this one having arisen. Now, it was doubtless true that the common law, in the very parts adopted and taking force, would in many of its special features and rules require alteration and amendment upon considerations of policy, either existing at the time of independence or to be developed in the future. But the framers of the constitution of 1776, wisely appreciating the necessity of carrying into their new political condition some matured and completed system of jurisprudence for defining and protecting rights of property, as well as civil rights at large, chose to adopt as such a system, the body of the common law as it then stood, giving immediate and full force in all their rules to those branches of the common law which, as a whole, were applicable and necessary, such as was the law of real estate. And taking into consideration this very necessity of future alterations and adjustments in particular features, the framers of the constitution of 1776 provided for it by devolving the power to make such alterations upon the legislature. Then following this action of the framers of the constitution, in exact accordance with the terms of this provision, as well as with the true and universally admitted, though not always strictly observed, line of separation, between legislative and judicial power, has been the uniform practice, both of our courts and our legislatures. It is well known that much of the English law of real cetate, such as the rules of inheritance, and the system of entails, were out of harmony with the genius of our people; yet these, and all other features of the common law of property, found to be inexpedient or unacceptable, were, both before and after the Revolation, excluded or modified by the legislature only, never by the It cannot be found that a single rule of property, well settled as a part of the common law of England prior to the Revolution, was ever excluded from our jurisprudence by judicial decision only, although many of these rules rested originally upon reasons which had no existence in this country, and were for our people needlessly artificial; such, for a single example, as the rule in Shelley's Case. On the whole, it must be clear, from uniform .1 . 11 .

of certain rules of the common law, forming parts of an entire system or branch, such as the law of real extate, did not render those rules subject to be judicially eliminated from the system in which they were incorporated, and then declared inapplicable to the circumstances of this country, in the sense of the implied limitation we have been considering. This was never done by the courts, even as to rules of property plainly inexpedient under the circumstances of the country existing at the time of independence; a fertieri would it be inadmissible upon considerations of policy developed in the subsequent growth or progress of the country, which, as we shall presently see, is the chief objection taken to the English doctrine of ancient lights.

It is a noticeable fact that the English doctrine was recognised without question as part of the common law by the early judges of the state and of this country-judges certainly more likely than later once to receive correct impressions of the state of our common law as originally derived from the mother country. No · early adjudged cases directly upon the point are found, but the incidental expressions of opinion in the courts, sufficiently indicated the general direction of judicial and professional opinion, as in favor of the doctrine; and this, though not authority, is evidense of no small weight that as a matter of judicial history the English rule was, at the period of our independence, regarded as part of the common law, and was not then inapplicable to the circumstances of the colonies. The first expressions of opinion in New York were decidedly that way: Mahan v. Brown, 18 Wend. 261 (1885); Banks v. American Tract Society, 4 Bandf. Ch. In Massachusetts the early tendency of judicial opinion was in that direction, and a statute was passed in 1862, expressly exeluding the English rule: DEWEY, J., in Atkins v. Chilosn et al., 7 Metc. 408 (1846); C. J. SHAW, in Fifty Associates v. Tudor, 6 Gray 260 (1856). So, in Maryland, Donsey, J., in Cheng v. Stein, 5 H. & J. 477. So, in South Carolina, where in 1838, in McRoady v. Thompson, Dudley 181, upon very full consideration the court held and applied the English doctrine as to lights. In New Jersey, and in Illinois also, there have been direct decisions holding the English rule in force: Resease v. Pittenger, 1 Greene Ch. 57; Gerber v. Grabel, 16 Ill. 217. It was not until the year 1888, in the case of Parker v. Foote, 19 Wend. \$18, that any disentisfaction with the rule appears. That case in New York was followed in Maine by Pierre v. Ferneld,

26 Me. 436 (1847); in South Carolina, by Napier v. Bulwinkle, 5 Rich. 99 (1852); in Maryland, by Cheny v. Stein, 11 Md. 1 (1858); and in Massachusetta, by Rogers v. Sawin, 10 Gray 376 (1858); and Carrig v. Dec, 14 Gray 588 (1860).

The objections to the doctrine taken by these cases are two: one is that the enjoyment of light and air in a tenement receive! over adjoining land is not an invasion of the possession of the servient owner for which he could maintain an action, and therefore is not such an adverse user as to raise against him the presumption of a grant. This objection assumes that under the true principle of prescriptive title, the presumption of a grant arises only upon the omission of the servient owner to take a legal remedy against the casement or servitude exercised. Some learned judges have gone so far as to speak of the doctrine as " an anomaly in the law," 19 Wend, 318. But an examination of the history of the law of presumptive title from immemorial user would show that the presumption of a grant rests on a broader ground than the one stated, that is, on the long-continued acquiescence of a servicat ewner, not alone as evidenced by his waiver of a right of action, but as well by his waiver of the unquestioned right to obstruct the privilege, se far as exercised over his land. The other objection, and the controlling one, which has given to this course of decisions their direction, stated in the language of the cases, is, that the English doetrine as to lights "cannot be applied in the grawing cities and villages of this country without working the most mischievous consequences:" Parker v. Foote, 19 Wond. 818. It will be observed that the first objection challenges the original technical propriety of the rule; and if tenable would support the conclusion that the doctrine of presumptive title was in the beginning erroneously applied at common law to the case of light and air. The latter objection rests upon considerations of public policy growing out of a state of the country developed since the independence of the colonies. Now, giving to both these objections the atmost force, they still fail to meet my difficulty, which is that the dectrine of asscient lights being, m point of fact, a rule of the English common law of real estate at and prior to 1776, whether upon good technisal grounds or not is immeterial, and having by force of the constitution of that year become a part of our common law of real estate, it can be altered only by the legislature. Meanwhile the courts must administer the rule as part of the common law adopted in the constitution of 1776, without inquiring whether, on the one hand, it was improperly or erroneously incorporated into the law in the first instance, or whether, on the other hand, under the increase of population and the rapid growth of our cities and towns since 1776, the rule is now found to work inconveniently or mischievously.

A few words in conclusion upon a point that has frequently pressed itself into my reflections upon this case; that is, the danger of drawing too strictly and narrowly against the courts the limitation between the judicial and the legislative authority to change or modify rules of the common law. It is, of course, true that any system of jurisprudence, in order to meet the wants of society, more especially the common law, which less than any other is codified, must have a progressive development, expansion and improvement, and new adaptations to changes in the condition of society and to newly-arising interests while becoming subjects of legal protection; and this slow and silent growth has been, and, of necessity, must be in part and to a large extent the work of the courts. Many and important modifications in the common law, both in its principles and remedies, have gradually and imperceptibly grown up, based upon what is termed a course of judicial decisions. There is one large field within which this moulding influence of the courts may be legitimately and usefully exercised. It embraces what may be termed the administration of the common law, its process, remedies, rules of practice, and of evidence. In all that concerns these it is difficult to see why the courts should feel themselves restricted in modifying and re-adapting them in details, from time to time, as experience or changes in the condition of society may render obvieasly expedient. For those who administer the system, and are personally cognisant of the operation of its rules and modes of procedure, can better comprehend the necessity and precise extent of any changes or re-adaptations which may be required, and the best methods of effecting them. And certainly, the conservative temper, so characteristic always of the judicial mind, renders it a safe depository of such a power. There is another department of the common law in the growth of which the influence of judicial decisions has been largely felt. This embraces all that body of rules and principles which regulate the transactions of trade and business. No precipitate, sudden or radical change in these has been ever made except by acts of legislation; such, for example, as was the Statute of Anne, giving negotiability to promissory notes; a elifa e talagea el periol de Francisco e en contrata la 1900 de en

course of judicial decisions, the whole body of the law merchant. All this is an unavoidable and legitimate exercise of the judicial function. But there is one branch of the common law in which the courts have scrupulously and wisely refrained from any judicial changes. That embraces all those rules and principles which directly concern what may be called the fundamental social rights, rights of person and of property, especially the latter. The rules which define and protect these, operate directly upon the people whose experience under such rules is the best test of the expediency of changes in them. Hence, for such changes, legislative action only is appropriate and safe, and on such changes the courts do not venture.

With respect to the law of property there is an additional and very important reason for this caution, i. e., that judicial decisions, in theory at least, are supposed not to alter but simply to declare and administer the law; so that a decision, or a course of decisions, which in effect should change or modify a rule of property by declaring it otherwise than it has before been understood to be, operates retrospectively, affecting not only future titles, but also titles before acquired and transactions entered into in reliance upon a different state of the law. So great a mischief is the unsettling of confidence in titles held to be, that rather than incur the hazard of it the courts have not unfrequently refrained from declaring, as a rule of property, what would have been well founded upon legal principles applicable to the subject-matter, solely because it was apprehended that titles were resting upon a generally-accepted different state of the law. A striking example, among many, of this caution is found in the English decisions, which continued to deny dower to the widow, out of an equitable estate of her deceased husband, long after those estates had been subjected in equity to all the incidents of legal estates, even to the curtesy of a surviving husband. The allowance of curtesy and the denial of dower out of estates of precisely the same nature was felt to be anomalous and an unreasonable discrimination against the wife. This is acknowledged by so great a judge as Lord REDESDALE, in D' Arey v. Blake, 2 8. & L. 388. "Courts of equity," be says, "bad assumed as a principle in acting upon trusts to follow the law; and according to this principle they ought in all cases where rights attached on legal estates to have attached the same rights upon trusts, and consequently to have given dower of an equitable estate. It was found, however, that in cases

titles to a large proportion of the estates of the country; for that parties had been acting on the footing of dower upon a contrary principle, and had supposed that by the creation of a trust the right of dower would be prevented from attaching. Many persons had purchased under this idea. * * * But the same objection did not apply to tenancy by the curtesy; for no person would purchase an estate subject to tenancy by the curtesy without the concurrence of the person in whom the right was vested. take to be the true reason of the distinction between dower and tenancy by the curtesy. It was necessary for the accurity of purchasers, of mortgagees, and of other persons taking the legal estates, to depart from the general principle in case of dower; but it was not necessary in the case of tenancy by the curtesy." And so dower, out of equitable estates, continued to be denied, until finally this anomaly in the law was corrected by the Statute of 8 & 4 Will. 4, ch. 105.

Now, to apply this conservative rule of judicial action to the present case, how can it be doubted that during the long interval after the adoption of our state constitution in 1776, until at least the year 1888, when the doctrine of ancient lights as part of the common law of this country was first drawn into question, it must have been practically recognised as the law of this state in any transaction depending upon the question; and that it would have been so adjudged had any case arisen for its judicial application? And can there be doubt that at this day there may exist in this state, rights materially affecting the value and enjoyment of property supposed to have been acquired under the common law of ancient lights, since, as yet, no contrary rule has been declared by our courts or could reasonably have been inferred to exist? Certainly it is wise not now to risk the unsettling of such interests by judicially declaring the rule to be what until recently neither our courts, nor the bar, nor the people concerned, could with reason have supposed it to be; on the other hand, a legislative alteration of the law will serve all the considerations of policy which have been urged against continuing the doctrine of ancient lights, and yet by operating, as it would, prospectively, will leave undisturbed any interests which may have grown up under a reasonable belief that the old law was still in force.

The English destrice referred to in country. In a majority of those in the principal case, has been variously which the question has arisen, it has marked in the Allbana states of this been held that no such describe forms a part of the law of that particular state. The reasons for not following the Eng-Noh rule have been various, but that usually assigned has been the inapplicability of the rule to the circumstances of a new and rapidly growing community. Where so many varant lots must attend for years the progress of municipal improvements, it was considered wrong to import a presumption of foreign growth, and which is inapplicable to our circumstances, and to declare in the first cases which called for its application that it was a part of our law. Home Judges have denied that the Statute of James (21 James I.), and its application by analogy to easements, was ever In force in their state, but it is believed that most of the sourts who have refused to adopt " the modern English doctrine of ancient lights," have rested their decisions upon the ground of inapplicability above stated.

In Word v. Nacl, 87 Ala. 500 (1961), It was held that the English doctrine did not prevail in that state. In Ray v. Lunes, 10 Ala. 63 (1846), the point was not raised, as the privation of light and air was not averred to be material, and the privilege had not been enjoyed for such a longth of time that acquiescence could be presumed. It is perhaps implied in that case that when the point erose the English rule would be followed, but the question was not diseased, and Mr. Washburn is therefore wrong in referring to this case as one in which the English doctrine was followed: Washburn's Easements and Servisados, 84 ed., p. 622, § 27. He is equally incorrect in referring to Gerber v. Grabel, 16 III. 217 (1854), and Durel v. Boisblane, 1 Louisiana Ann. 407 (1866), as sustaining the English rule. In the first of these cases, in an action on the case for the obstruction of lights, the jury found for the plaintiff, the court arrested the Judgment and entered it for the defendant. The two grounds nd he the defeadant were (1) that

the declaration did not prescribe for section lights, but merely averred persection and the right to enjoy; (2) that the doctrine of ancient lights did not prevail in Illinois. Two of the three members of the Supreme Court (SCATES and CATON) reversed the court below and remanded the case for judgment on the verdict.

SCATES, J., said, that the English rule was not in force in Illinois, because the Statute of 21 James I, had not been adopted in Illinois (only those statutes in aid of the common law prior to 4 James I. have been adopted in that state), and as the doctrine of the presumption of grant from adverse user of light and air for twenty years, could not he traced back to a period beyond 21 James I., it could not be said that the modern English doctrine was in force. After quoting the older English cases, the judge said: "While we highly respect the learned decisions of English courts adopting an analogous rule to their Statute of Limitations, we must how to the authority of those older rulings, with liberty to say that a tweaty years' prescription for the ensement of light and air is not applicable to the circumstances of this state, unsettled and unimproved as it is." The difference is there pointed out between casements, the use of which requires physical possession and occupation, and is therefore adverse, and easements the enjoyment of which is lawful and does not invade the rights of others, as is the case in easemonts of light and air. " Under these directostances, the presumption has a sensible basis to operate upon in the forbearance of the injured party to vindicate his rights by entry or action, and his acquisesomes in the known claim and appropriation of his rights, by another. * * * But no part of his reasoning will apply to an incorpercal corritate of light and air. * * * There is no wrong to complain of, at Industria andreas on to the

easements referred to. It cannot, therefore, become an easement or servicule upon the land until it begins to operate upon the owner's right of obstructing the light and air. When then duen this servetude begin ? At the precise period, when man's memory of its adoption is lost. Buck was the common law of our adoption, and its adoption is as well suited, in all things to us, as to any people or country." The judge went on to say, however, that as it seemed that the judgment in arrest must have been predicated upon the insufficiency of the declaration in not averring the lights to be ancient, and as the court was of opinion that the plaintiff might have proved a prescriptive right under the common law of liffnois, or an express grant, or circumstances from which a grant or estoppel might be presumed, it was to be presumed in the absence of evidence, that the verdict was warranted. CATON, J., came to the same conclusion, but thought that the English rule formed part of the common law which was adopted in Illinois, and that rule was binding on the court, even though the public good would be promoted by its repeal. Tukar, C. J., discented, on what ground is not stated. It will be seen then that what was decided in this case was that the declaration was sufficient; that two judges differed as to the condition of the law in Illinois, in regard to ancient lights, while the third judge thought that judgment was properly entered for the defendant, his reason necessarily being that the declaration was defective, for the evidence was not brought up by the record, and there is nothing in the report of the case to show that the plaintiff founded his right upon the existence in Illinois of the English doctrine of suciont lights.

In Derel v. Boisblene, supra, the question under discussion did not arise at all. In that case, two adjaining lots, with houses created on them, were sold by the same owner to different persons. The windows of the house on one of these lots opened on a passage-way on the other lot, which separated the two houses; and to the yard of this house there was no access except by this passage-way. It was held that as the servitudes of way and light were apparent and necessary for the latter house, and were not concealed from the purchaser of the adjoining property, the latter was not entitled to rescind his purchase, and his lot was subject to the above-named casements. See Levelleheurs v. Congrere, 13 La. Ann. 323 (1858).

In Pierre v. Fernald, 26 Mg. 436. the plaintiff's premises, as well as those overlooked by his windows, had been in his possession during a portion of the twenty years preceding the cause of action, the plaintiff having hired the adjoining premises from the owner of them. It was held that, whether the English rule prevailed or not, the plaintiff could not recover for the obstruction of his windows, for there could be no presumption of an adverse use by him of the light and air passing over premises adjusting his own, while the latter. were in his possession. The English rule is, it is true, declared inapplicable to this country, but the decision rests on the ground stated.

In Wright v. Freeman, 5 11. & J. (Md.) 467 (1823), Donaky, J., said: " So the enjoyment of lights for twenty years, with the acquiescence of the owner of the fee of the adjoining ground, is such a decisive presumption of a right by grant or otherwise, unless contradicted or explained, that the jury ought to believe it." But in Cherry v. Stein, 11 Md. 1 (1857), the contrary was deeided. One of the questions in that eare was whether the English rule was the law of Maryland. Eccusoron, J., said: "We do not consider as applicable to the cities and villages in this state such a right to lights by twenty years' user of them as in some of the American cases has been called 'the

modern English doctrine." The case of Smith v. When, decided by the Beltimore County Court, to referred to as taking the same view.

In Sorg v. Odin, 12 Mass, 187 (1815), JACKSON, J., said that the plaintiff might have proved that the house was on ancient one, or that he was entitled by prescription to the casement of light, though those facts were not set forth in the declaration. But the question as to the prevalence in Massachusetts of the English rule was not raised. In Atkins v. Chilms, 7 Met. 208 (1844), Daway, J., referring to the question, said: "The tendency of our (Massachusettr) decisions has been the other way," (from those of New York), i. e., in accordance with the English rule. The point was not decided. So in Dyer v. Sanford, 9 Met. 895 (1845), SHAW, C. J., said, "this was a modern house, and had acquired no rights of light and air for the staircase. window ever D.'s land;" and in Fifty Associates v. Tudor, 6 Gray 355 (1856), the same judge commented upon the discrepancy of the decisions on this subject, and declined to decide the point.

But in Rogers v. Sawin, 16 Gray 376 (1858), the court recoded from the view beretofore expressed, and decided that the English rule was not in force. After stating the law of England, METCALF, J., said: "Is this the common law of Massachusetts? We think not. " " " The short grounds of the decisions cited are, (1) that the making of a window in one's building, on his own land, and overlooking the land of his neighbor, is no encreachment on his neighbor's rights, and therefore cannot be regarded as adverse to him; (2) that the English doctrine is not applicable to the state of things in this country, and would, if applied, work mischieveus consequences in our cities and villages." This was followed in Corrig v. Dec, 14 Gray 108 (1990). In that case it was hold that to comment of light and air was co-

quired by their free passage for more then twenty years prior to the statute of 1892, to the window of a house resting on the boundary line, although the shutters of the windows swang on their hinges over the adjoining land. SHAW, C. J., said the court are of opinion that the window on hinges ewinging outward over defendant's land did not constitute such an adverse possessory use of the adjoining land as to make any difference in the principle. In Richardson v. Pond, 15 Gray 307 (1900), it was again held that twenty years' use of light and sir, coming over adjoining property, raised no presumption of title to the easoment.

In New Jersey, as well as in Delawere, the English rule has been followed, and those states are, we believe, the only ones to which the question has been directly decided in that way. In Robreca v. Maswell 🛊 Pittenger, 1 Green Ch. 57 (1838), a motion to dissolve an injunction against the obstruction of lights which had evertocked the adjoining premises for more than twenty years was refused. The complainants were the owners of a lot and dwelling house erected thereon in 1802 by the fermer owner of that let and the one adjoining, which was overlooked by the windows of the dwelling. In 1866 the owner died intestate, and the lots and dwellinghouse descended to his children, who remained spined as tenants in common until 1828, when two of the beirs conveyed the vacant let to the third heir. It passed by several couveyances to the defendant, who, in 1830, began laying the foundation of a house which would immediately adjoin the dwelling-house above mentioned, and obstruct its windows. This latter lot and the house on it had remained in the passession of the heirs of the original ewner till 1835, when it was sold by them and person to the plaintiff. It will then be soon that the two adjoining loss were uninterruptedly in the personnies of the

same owners from the time of the creetion of the building on one lot till 1836. Uniose, therefore, the adverse use by the windows of the house built on one lot of the light and air passing over the other began ten years before the ownership of either of the lots passed out of the common owner, the doctrine which we have been discussing is wholly inapplicable, and the Chancellor (Punmixerow) is clearly wrong in deciding the case as be does upon a principle which, whether correct or not, can have no bearing upon the particular case. Throughout the decision the distinction referred to is wholly overlooked, and premising that the case is one of adverse user of light and air for more than twenty years, the Chancellor founds his reasoning upon and applies his illustrations to the particular facts which are not these of the case before him.

In Maken v. Brown, 18 Wend. 261 (1886), SAYAOR, C. J., said: " It is perfectly estiled that as the occupant may acquire a right to the house itself by twenty years' uninterrupted possession under claim of title, so in the same time he shall by occupation acquire a right to an eccement belonging to the house, * * * The person who thus opens a window overlooking the privacy of his neighbor, enjoys an easement in that which does not belong to him. Yet no action lies for this encroachment upon the rights of the person whose lands are thus overlooked, the encreachment will in twenty years ripon into a right, and it is said that the only remedy he to halid on the adjoining land oppoalte to the effective window." In this case the lights had not been enjoyed during twenty years, and a motion to out acids the measult which had been entered was denied.

In Purber. v. Fosts, 19 Wood. 809 (1800), in the same year in which the question had been decided in New Jersey in favor of the English destrine, the appeals view was taken in New

York. The English rule was held inapplicable to this country; Bankson, J., saying, "as neither light, air nor prospect can be the subject of a great, the proper presumption, if any, to be made in this case, is, that there was nome covenant or agreement not to obstruct the lights. * * * In the case of windows overlooking the land of another, the injury, if any, is merely ideal or imaginary. The light and air which they admit are not the subjects of property, beyond the moment of actual occupancy. and for overlooking one's privacy no action can be maintained. The party has no remedy but to build on the adjoining land opposite the offensive window. • • • In the case of lights there is no adverse user, nor indeed any nee whatever of another's property, and ne foundation is laid for indulging any presumption against the rightful owner. • • • What is the acquiescence which concludes the owner? No one has trespessed upon his land, or done him a legal injury of any kind. He has submitted to nothing but the exercise of a lawful right on the part of his neigh. bor. How then has he forfeited the beneficial interest in his property? • • • There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England. * * * But it cannot be applied in the growing cities and villages of this country, without working the most mischieveus consequences. It has never I think been deemed a part of our law." Natson. C. J., concurred; Cowax, J., descented.

In Banks v. Am. Truct Soc., 4 flands. Ch. 486 (1947), a decision as to whether the English doctrine provailed was studiously avoided, though the point was before the court. In Myors v. Gaunal, 16 Barb. 337 (1951), the owner of two adjoining lats, an one of which was a building with windows opening on the vacant lot, leased the lot with the bours

on it to another for years, without reserving any rights to himself. Bold, that the doctrine of another lights did not apply in this country, and that to build a house on the vacant lot adjoining, not being in derogation of his grant, could not be enjoined against. EDMONDS, P. J., dissented.

"Only such parts of the common law," says Mitchell, J., "were brought by the colonists with them as suited their condition. " " A law inapplicable to the condition of the country for so long a period could not belong to that part of the common law which we brought with us, namely, se much only as was applicable to our condition, nor as part of the law of the eclosy on 19th April 1770. " " 4 It is against the spirit of our people to escumber their lands with privileges in favor of other, though adjoining lands. whother held by them or others. * * * In such a community it would be doing Violence to the habits and customs of the people to presume a grant or intention to great a right to another over adjoining property not within the limits shown on the face of the grant, or not unquestionably indicated by the use and situation of the property."

In Mailes v. Bricker, 19 Ohio St. 135 (1909), the question was not raised. but Water, J., expressed his disapproval of the English doctrine. "We understand the law to be in Ohio that no prescriptive right to the use of light and air through windows can be sequired by any length of use or enjoyment. * * * It seems to us that the destrine of encoments in light and air, founded upon sheer necessity and convenience, like the kindred destrine of · ancient windows or prescriptive right to light and air by long user, is wholly unsuited to our condition, and is not in necessance with the common understanding of the community. Both doctrines are based upon similar reasons

and considerations, and both should stand or fall togother. They are unsuited to a country like ours, where real estate is constantly and rapidly anpreciating, and being subjected to new and more costly forms of improvement. and where it so frequently changes ewners as almost to become a matter of merchandise. * * * It will be eafer and more likely to subserve the ends of luntice and public good to leave the parties, on question of light and air, to the boundary lines they name, and the terms they express in their deeds and contracts." Haverstick v. Sipe, 83 Penn. St. 368, quoted and approved.

In McCroady v. Thomson, Dudley (A. C.) 181 (1838), the verdict was for the plaintiff in an action on the case for obstructing lights during fifty-Are years. A motion for a new trial was dismissed. O'NEALL, J., seying: "The common law is very clear that one may prescribe for air and light as well as for ony other easoment. Prescription presumes a grant. The use of the easement for twenty years and upwards, is only the evidence of it. * * * But (it has been) insisted that the rule was an unwice one, and inapplicable to this country. The first argument may very property be addressed to legislators; with judges, however, it can have no weight. The law, as we find it, and not as we week! have it, is to be our guide. The other argument can have as little force; the correges law is the law of South Careline, as much so it is of England. • • • There is nothing in the principle new under ecasideration, which readers it wasultable to our political or civil institutions. It is a more private right, originating in concent, and perfected by lapee of time, contributing to the comfort and value of a person's habitation, ' But in Napier v. Belwieble, & Rich. (8. C.) 811 (1888), the appeals view was taken. Wantstaw, J., said: "Where no other orthonor of assent to

giren, the fair inference from unobstructed enjoyment of such a window is, that there was acquiescence in a favor, but not in a right; that the obstruction was forborne, not because an easement had been granted or the acquisition of one thought of, but because, to the owner of the space, it was immaterial to what use another might turn the elements that had passed through his space and served his purpose. * * * Where nothing besides the unobstructed enjoyment appears to sustain the right, he who complains of his window being derkened by the alterations of his neighbor's property, may well be told that there he should have auticipated."

In Hog v. Blerrett, 2 Watts (Pa.) 827 (1834), it was said by Roomes, J., "The doctrine of the English books in respect to ancient lights is not very well understood in this country. I am not aware that any case has been ruled in this state in which the principle has been recognised. It should be introduced with caution. Many vacant lots in our cities and towns are ewned by persons who reside at a distance, and who are either mable or unwilling to improve them. It would be most inconvenient to compel them to do so, on the penalty of forfeiting a valuable right by negleėt."

In Magnard v. Ester, 17 Penna. St. 222 (1851), it is said by Lownin, C. J., "Where a man, owning a lot partly covered by a house with windows opening out upon the other part, sells the part on which the house stands, then the purchaser acquires a right to have light and air from the adjoining part, so that the vendor will be restricted in building upon k. . . . Where both lots are passing out of the vendor at the same instant, it is impossible to imply that he is making one corrient to the other; and this is copecially so when he is selling both lots cheer of encombrances, for an ecomoni

is an encumbrance." In Hurerdick v. Sipe, 33 Penna. St. 368 (1859), Lowren, C. J., said: "It has never been considered, in this state, that a contract for the privilege of light and air over another man's ground could be implied from the fact that such a privilegs has been long enjoyed; or that, on a sale of a house and lot, such a contract could be implied from the character of the improvements on the lot sold and the adjoining lots. How can we define an easement for light and air by implication, without arresting all change in the style of buildings, all enlargement of a man's house according to the demands of a growing or improving family? * * * The advantage which one man derives by obtaining light and air over the ground of another, is no adverse privilege, as it ordinarily appears; for it is no sort of encroachment on the land of another, or interference with his onjoyment of it, and he could not without churlishness protest against it when used with neighborly propriety. The enjoyment of such a privilege needs no implication of a grant to account for it, and nous is made."

In Hubbard v. Town, 33 Vt. 295 (1860), it was held that the English rule did not apply in Vermont. The ground of the decision was that a grant, waiver or abandonment, cannot be presumed against one who is unable to preserve the thing unlawfully used by an action against the trespasser. An action will not lie against one whose windows overlook my land; it cannot therefore be presumed by more lapse of time in such a case that I have deprived myself of a right to close these windows in the only lawful way, vis.: by building against them.

In Morrison v. Marquardt, 7 Am. Law Reg. M. A. 896; a. c. 94 lows 95 (1967), Diston, C. J., says: * * ** Perhaps the law as to implied casements generally cannot be said to be fully settled, and this is particularly true in this country as to assements of light and air. The right to light and air seems in many respects to be different in its nature from easements relating to artificial erections on the serviculation, such as drains, gutters, pipes, &c., or rights of way and the like.

"As to light and air, I am free to say that I do not believe the rule, as applied to our situation and circumstances, a sound one, which holds that under any stroumstances this right can by implication be hardened upon an adjoining estate, as to prevent the owner thereof from building upon or improving it as be planes. I would reverse the rule and hold that he who claims that the ten " " feet adjoining him " " " shalf remain vacant and unimproved, should found such claim upon an express great or oversent.

"This rule is simple. Granter and grantes would both know that the deed is the measure of their rights. Is it any hardship upon the purchaser to secure by express grant, lights so valuable to him and so detrimental to his granter,-rights which, unless limited and defined by written stipulations, are of uncertain extent and uncertain deration f * * * A donial of an encement of more implication, as respects light and air, may, in my judgment, well be, without denying that other easements of a different character may, and in some cases should, be held to exist by implication." [The point was not, however, decided, since it was held the circumstances negatived conclusively the presumption of the implied encoment.]

It is a well-known principle of law

that in cases of deals the words of a grant are to be interpreted against the grantur. This principle, in its application to the subject of which we are treating, is illustrated by the case of the United States v. Semuel Appleton, t Bussa. 494. In 1806 a block of buildings was built, consisting of a centre building with wings. There was a places in front of the centre building, ever which swang deers in the wings. In 1611 the wings were sold to the defondants, and the centre building was sold in 1916 to the United States, who had occupied it under a lease from 1998 to that time. Hold, that the defendance were under the terms of the great ontitled to the use of the side-doors as used at the time of the conveyance. independently of the lapse of time. The language of the conveyance was, "the above [wing] with all the privileger and appartenances." Broay, J. t "The law gives a reasonable intendment in all such cases to the grant; and passes with the property all those easements and privileges, which at the time belong to it, and are in use as appurtenances. • • • A man cells a dwelling-house with windows then looking into his own adjacent lands. There can be no doubt that the great carries with it the right to the enjoyment of the light to those windows; and that the granter cannot, by building on his adjacent land, entitle himself to obstruct the light, or close up the windows. * * * In truth, every great of a thing naturally and necessarily imports a grant of it, as it actually exists, unless the contrary is provided for."

Stoner Biocc.

Supreme Court of Errors of Connecticut. ISAAC STROUSE s. HENRY N. WILITTLESEY, Jr.

The defendant was driving through a city street in the evening, on the right hand side of the street, at a moderate speed, and in passing a team standing on the

as doing necessarily occupied about two and a half foot of the left hand side of the street. In thus passing around the standing team be came into collision with the plaintiff's vehicle which was coming towards him. There was ample room for both teams, but neither driver discovered the other till the moment of collision, and both the plaintiff and defendant were using ordinary care. Held, that the defendent was not liable for the damage.

Such a case is one merely of misfortune and accident, where each party must sustain the damage which happens to befall him.

TRESPASS ON THE CASE, for an injury by the negligent driving of the defendant; brought to the Court of Common Pleas of New Haven county. Facts found and case reserved for advice. The case is sufficiently stated in the opinion.

Driscoll and Asher, for the plaintiff.

Wright and H. L. Harrison, for the defendant.

PHELPS, J.—The record in this case presents a very clear case of injury without proof of such negligence as renders the defendant legally responsible. The plaintiff and defendant were passing in opposite directions through Orange street, in the city of New Haven in the evening, both driving at moderate speed, and in the exercise of such care as is ordinarily observed by drivers, and each on the proper side of the street. The street is twenty-six feet wide at the place of contact. Of that space eight feet on the side the defendant was driving was occupied by a standing team. He turned into the middle of the street only so far as was reasonably necessary to pass the standing wagon, and in so doing occupied two feet and four inches beyond the centre line of the street. He did not discover the plaintiff's vehicle until the instant of the collision. The plaintiff had the remainder of the street, ten feet and eight inches, which was double the room which he actually required.

Each party followed the rule which required him to keep to the right hand side of the way, and but for the standing team no collision would have occurred. The defendant had a right to pass that team, and if necessary for that purpose, to cross the centre line of the street, provided he observed proper care in doing so, and saw that sufficient room was reserved for any team to pass in safety which might be coming from the opposite direction. He appears from the finding to have done his duty in this respect, and the facts disclose a case of misfortune and accident, without negligence or fault, in which the parties must respectively sustain the damage which happened to befall them.

We advise the Court of Common Pleas to render judgment for the defendant.

We publish the foregoing case because it covers, and, as we think, correctly decides an important question of law; one that occurs almost hourly in some portion of our widely extended country. And there seems to be some hind of Impression among the profession, both here and in England, that one may become liable to an action of trespans for direct injury to another, either by falling accidentally upon him, or having his horses or team ruch upon him, in the street, even where he is guilty of no negligenes. We infer the existence of this impression, as we have just stated, from the continued institution of actions of this character, as will be sufficiently apparent from the principal case, and the recent case of Helmes and Wife v. Mather, in the Court of Exchequer, Jone 24th 1875, 28 W. R. 345, where the question is very learnedly discussed both by the court and bar. After discassing the matter at some longth. BRANWELL, B., reaches the conclusion that when the damage is indicted by direct force, and the defendant had no purpose of doing the act, and was guilty of no negligence, no action will lie. In this case the defendant was in the carriage with his driver, and "the horses were startled by a dog, and, without any fault of the defendant or the groom, became unmanageable and ran away down the street. The groom requested the defendant to sit still and not to interfere in any way. On reaching the and of the street, where it was crossed by another, the horses swerred to the right, and were in danger of running into a shop window; the driver thoroupon attempted to turn thou still more to the right, in order to make them go down the cross street." which would have avoided the accident; but only partially succeeding, they ran against " the female pinintiff and caused

court considered the act of the green to be that of the defendant, as he was present and made no dissent. Chap-By, B., said: "The act of the groom in guiding the horses was not the act of the defendant i" but all agreed, as there was no wrong intent and no negligence or want of proper and judicious effort to escape doing the injury, or any injary to any one, there could be no recovery. Beron Buanwack, then whom no living judge is more expert in hitting the exact point of all cases before him. said: " Far the convenience of mankind, in corrying on the affairs of life. prople, as they go along reads, must expect and put up with such mischief as reasonable care on the part of others rannot avoid, otherwise we should have actions every time a dress, or even a freehly-painted door, is splanhed by a passing vehicle." The question was early considered, in Vincent v. Steinhour, 7 Vt. 68, with the conclusion that no action can be maintained where the injury complained of results from unavoidable socident, and no blame is imputable. Williams, Ch. J., gave a most satisfactory opinion, citing many illustrations, and the following cases: Gibbone v. Pepper, 4 Med. 408; Webeman v. Mebinson, 2 Bing. 213; Goodman v. Taylor, S C. & P. 410, and some otbers.

There is an important point raied in the English case, that the defendant is not liable for doing all he can in such case to word off injury from any one, even though in consequence the blow nitimately falls upon one who would have occaped if no such efforts had been made. It is like the case of the squib in Scott v. Shephord, 2 W. Bi. 893; 2 Sm. L. C. 210. Fletcher v. Rylands, L. Rep., 1 Exch. 200, and Hommerk v. White, 11 C. B. N. S. 200, are authorities for the defendant in this class of

Supreme Court of Appeals of Virginia.

SPRINKLE c. HAYWORTH ET AL.

Testator devised to his wife absolutely all his estate, real and personal. The wife died two days after his death, intestate. Bill is filed by testator's heirs and next of him to set up a paral agreement between testator and his wife, that, at the death of wife, the property was to be equally divided between the two families. Held, unless front is alleged and proved, no such trust can be set up by paral.

The limitation over, being of what was left at death of wife, could not be emforced, even if it had been expressly limited on the face of the will, as such a limitation would be repugnant to the absolute device and void.

APPEAL from the Circuit Court of Smyth county.

A. B. Sprinkle, the testator, and his wife, having by their joint industry amassed quite a large fortune, and never having had any children, it was their wish and intention, often expressed, that whatever of their property might be left unexpended and undisposed of at the death of the survivor of them, should be divided into moieties, one of which should go to the family or collateral heirs of the husband, and the other to the family or collateral heirs of the wife. The husband died on the 19th of January 1870. The wife survived him only a day or two; having died on the 21st of January 1870. She appeared to have been in usual health at the time of his death, but almost at once became paralyzed, and remained so, and generally unconscious, until her death.

By his will be left his entire estate to his wife absolutely. She died without leaving a will, not having been in a condition to make one in the short interval between his death and here.

The bill in the present case was then filed by the heirs at law and next of kin of the husband against the heirs at law and next of kin of the wife, for the purpose of setting up and enforcing the alleged parol understanding and agreement between the husband and wife, for the equal division of the estate of the husband left at the death of the wife, between their two families as aforesaid.

Some of the defendants filed their answers to the bill; in which they denied that there was any such understanding and agreement between said Sprinkle and wife.

The court decreed that plaintiffs were not entitled to recover and would then have dismissed the bill; but it appearing that the property had been rented out under the order of court, and that

We are indebted to Mr. Gilmers, counsel for the appelless, for the report of this case.—En's. An. Law Res.

the transaction on that account remained unsettled, the cause was retained for the purpose of such settlement, whereupon plaintiffs took this appeal.

R. A. Richardson and J. W. & J. P. Sheffey, for the appollanta, cited Perry on Trusts, sects. 74, 75, 77, 82, 96; Sandors on Uses 14, 218, (2 Am. edit.); Fleming v. Donohue, 5 Ohio 250; Bank of United States v. Carrington, 7 Leigh 576; Walreven v. Lock, 2 P. & II. 549; 2 Story's Eq. Juria., sects. 20, 82, 44, 57, 781; 1 Blackst. Comm. 92; 8 Greenleaf on Ev., sect. 265; Oldham v. Litchford, 2 Vern. 506; Drakeford v. Wilks, 8 Atk. 589: Podmore v. Gunning, 2 Sim. 644; Barrell v. Hanrick, 42 Ala. 60.

John W. Johnston and James H. Gilmore, for appelless, cited Wright v. Puckett, 22 Gratt. 874; Pieroc's Heirs v. Catron, 23 Grattan 597; Browne on Statute of France, sects. 84, 94, 96; Perry on Trusts, sect. 94, p. 65; Gilbert's Forum Romanum by Tyler 828, 829; Here v. Shearwood, 1 Ves. 241; McCormick v. Gregon, 4 English and Irish Appeals (1869-76) 82; Devenish v. Baines, Finch's Prec. in Chanc., case 3, p. 5; Redfeld on Wills, part 1, sect. 89, pl. 6, letter d, top of page 546-7; Ibid, sect. 88, pl. 89, pp. 527, 528; Greenless on Ev., vol. 1, sects. 289, 290; Perry on Trusts, sect. 115, pp. 88, 89; May v. Joynes, 20 Gratt. 692.

The opinion of the court was delivered by

Moncure, President.—There never was a will more plainly written, or one on the face of which there was less room for doubt or difficulty in the construction of it, than the one we new have before us. The language of the second clause is: "I will and bequeath to my beloved wife, Phasbe, all my estate of which I may die possessed, both real and personal, of every description whatseever; she having aided me in making all that I have. My desire and will is that she shall own, absolutely, everything that I may die possessed of." Could language be more comprehensive or emphatic to invest the wife with the largest possible interest in, and power over, the estate of the husband? But to make it still more plain, if possible, the testator proceeds in the last clause to say: "As my wife is hereby made my beir and sole devices, I hereby constitute and appoint her the executrix of this my last will and testament, and desire that she shall not be required to give any

And yet, plain as is this written will, the plaintiffs contend that it ought not to be carried into effect as it is written; that there was a parol understanding and agreement between the husband and wife, in virtue of which the plaintiffs, his heirs at law and next of kin, are entitled to one moiety of the estate left at his death.

There could be no valid and binding agreement between husband and wife, as she was not a competent contracting party. Suppose there was in fact such an understanding between them as the plaintiffs contend for; could effect be given to it, contrary to the plain and express language of the written will?

To give it such effect, would seem to be clearly inadmissible, for several reasons; First, because, by the common law, it is a general rule that a written instrument cannot be varied or contradicted by parol evidence; and there is nothing in this case to make it an exception to the general rule; Secondly, because such an effect would be contrary to the spirit and true intent and meaning of the Statute of Frauds, Code, p. 985, ch. 140, sect. 1. And, Thirdly, because it would be contrary to the Statute of Wills, Code, p. 887, ch. 112, sect. 1; Id., p. 910, ch. 118, sect. 4; which declares, that "no will shall be valid unless it be in writing, and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly written by the testator, the signature shall be made, or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the tentator; but no form of attestation shall be necessary." And sect. 8th; which declares that "no will or codicil, or any part thereof, shall be revoked, unless under the preceding section (in regard to revocation by marriage), or by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by the testator, or some person in his presence and by his direction, cutting, tearing, burning, obliterating, cancelling or destroying the same, or the signature therete, with the intent to revoke." It would be strange if, after all this care taken by the legislature to prevent fraud in the making and revocation of wills, a will, solemnly made in strict and literal pursuance of all the requisitions of the statute, could be

annulled and destroyed by loose declarations of the testator, testified to chiefly by interested parties.

A great deal was said in the argument about the emission in our statute of the 7th sect. of the English Statute of Frauda, which declares, that, "all declarations or creations of trust and confidence of any lunds, &c., shall be manifested and proved by some writing signed by the party," &c., and it was argued that while under the English statute, such a trust as is attempted to be set up in this case would be invalid, it is valid in this state, for the reason aforemaid.

Certainly a resulting trust is not even within the English Statute of Francis, and of course is not within ours. Indeed the 8th sect. of the English statute, which is also emitted in ours, expressly excludes resulting trusts from the operation of the statute. The case of the Bank of U. N. v. Carrington, fe., 7 Leigh 566, referred to in the argument, was a case of resulting trust. There are other trusts not strictly coming under the denomination of resulting trusts, which are not within the statute. Tucker, P., enumerates many of them, in his epinion in the case just cited. And in 1 Lomax Dig., top page 238, all these trusts are considered under the denomination of "implied, resulting and constructive trusts." For peculiar reasons they are excluded from the operation of the statute.

But without attempting to define these several trusts, or to give the reason why they are not embraced within the Statute of Frauds, or to state the effect, if any, of the omission in our statute of the 7th sect. of the English Statute of Francis, we think we can safely say, that even under our Statute of Frauds, if there were no other statute or law to prevent it, such a parol understanding or agreement as is set up in the bill, however well proved it may have been. would be insufficient to contradict or invalidate a will so plainly written as is the will in this case. It could not have that effect as a parol declaration or creation of trust, for to give it such an effect would be to subvert the statute. The most solemn wills and deeds could then be annulled by loose parel declarations under the name of trusts. The danger of admitting such declarations for such a purpose, was demonstrated in Con, fe. v. Con, decided by this court a few days ago. Even in the case of a resulting trust, the prot' ought to be very clear, if the trust does not arise on the face of t deed itself. Opinion of BROCKERPROVER, J., in the Bank of S. v. Carrington, de., 7 Leigh 576, and the cases cited by M

We do not mean to admit, however, that there is any difference in effect, between the English Statute of Frauds and ours arising from the omission in the latter of the 7th and 8th sects. of the former. That is a question which is unnecessary, and not intended to be decided in this case.

However that may be, we think the Statute of Wills, as before shown, plainly forbids that a parol will, whether in the form of a trust or otherwise, shall be set up and established, especially when there is a written will to the contrary, which has been executed and established in strict pursuance of the statute.

To be sure fraud may have the effect of setting aside a deed or will, or converting a grantee or devisee into a trustee for the benefit of others. The fraud which suffices to lay a foundation for such a trust is not simply that fraud which is involved in every deliberate breach of contract. The true rule seems to be, that there must have been an original misrepresentation, by means of which the legal title was obtained, an original intention to circumvent, and get a better bargain by the confidence reposed. Thus, as has been held in many cases, if a man procure a cortain devise to be made to himself by representing to the testator that he will see it applied to the trust purposes contemplated by the latter, he will be held a trustee for those purposes. Brown on the Statute of Frauds, § 94. See also Gilbert's Forum Romanum 828-9. There is a very recent case of the very highest authority in the English books, which was referred to in the argument of this case by the counsel for the appellecs, and which very strongly illustrates the law on the branch of the subject we are now considering. We mean Mc-Cormick v. Grogan, decided by the House of Lords in 1809, and reported in the Law Reports, English and Irish Appeal Cases, vol: 4. p. 82. The Court of Appeal in Ireland had reversed a decretal order of the Lord Chancellor there, and the House of Lords affirmed the decision of the Court of Appeal. It does not appear that there was any dissent from that decision in the House of Lords. Lord Chancellor HATHERLEY and Lord WESTBURY delivered seristim opinions in the case, and Lord CAIRNS expressed his entire concurrence in their opinions. We will have occusion to refer to that case again. We will now notice only so much of it as relates to the branch of the subject we are now considering. The Lord Chanceller, after stating several eases in which a devises had been held to be a trustee, upon parol proof of a fraud committed by him in procuring the device, thus proceeds: " But this

doctrine evidently requires to be carefully restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the legislature to pass the Statute of Frauds, and it is only in clear cases of fraud that the doctrine has been applied, cases in which the court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform." And Lord WEST-BURY said: "the jurisdiction which is invoked here by the appolant is founded altogether on personal fraud. It is a jurisdiction by which a court of equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. Now, being a jurisdiction founded on personal fraud, it is incumbent on the court to see that a fraud, a malus animus, is proved by the clearest and most indisputable evidence." Much more was said by his lordship which bears on the point now under consideration; but for the present we will quote no more from the case.

In this case certainly there is not a particle of proof, nor is it pretended that there was any fraud on the part of the devices to induce the device; nor that she would not, if she had lived long enough, have made such a disposition of the property as is now claimed by the appellants; not in discharge of an obligation which could be enforced in a court of law or equity, but as a voluntary act, in pursuance of what she no doubt believed were the wishes of her husband.

We are therefore of opinion that the parol evidence in this case was inadmissible to alter or contradict the will, or set up a trust under the same.

We are also of opinion, that even if the evidence were admissible, it would be insufficient to prove such a trust as is claimed in this case. The will itself, certainly, shows the intention of the testator more plainly than the parol declarations made by the testator and his wife, testified to, as they chiefly are, by interested parties. The will, as we have seen, is very plainly expressed; as if the testator was careful to exclude the idea that his wife should be considered as holding the property for the benefit, ultimately, of the heirs of the two families respectively, according to the claim set up in this suit, and not for her own exclusive and absolute use. If, really, the testator had intended to give these two families, or

have done so expressly in his will. He would, for example, have given a moiety of his estate to his wife absolutely, and the other moiety to her for life, with remainder to his own right heirs and next of kin. That he did not plainly do so, which he could so casily have done, is strong, if not conclusive, evidence to show that he did not intend to do so. He was not taken by surprise by death. His will was well and carefully prepared, obviously by a lawyer, more than a year before his death; and is, in substance, the same with a will which he had executed seventeen or eighteen years before. It was his deliberate and cherished purpose to make it as he did; and he meant what he said; whatever may have been his wishes in regard to the distribution of any of the property which might remain unexpended or undisposed of at her death. those wishes were altogether subordinate to his main intention, to leave all his estate of which he might die possessed, both real and personal, of every description whatsoever, to his wife; and that she should own absolutely everything that he might die possessed of. Though sometimes advised to name in his will, his wishes in regard to the ultimate distribution of the property which might be left at his wife's death, he carefully avoided doing so, lest his wife might thereby be restrained and limited in some degree in the use and enjoyment of the property. If he had survived her, the property would certainly have been his absolutely, to dispose of as he picased, and he could not have been restrained in such disposition by his heirs at law or those of his wife, upon the ground of any trust in their favor arising from the loose conversation between him and his wife or otherwise. As she survived him be intended to leave her in his place; and to give her the property and all power over it to the same absolute extent to which he would have held and enjoyed it had he been the survivor. He did not know how long she would live, nor what occasion he might have for the use of the property ufter his death, and therefore he gave it to her absolutely. He had perfect confidence in her, and was willing to give it to her absolutely; trusting and believing that she would do what was right when she came to dispose of of what property might remain undisposed of at her death. [The learned judge here proceeds to discuss the testimony filed in the case and to urge its unsatisfactory nature, all which we omit.]

The Virginia case to which we refer is that of May v. Joynes, Ac., 20 Gratt. 692, decided by this court in 1857, but not reported

the reporter: "Testator says, I give to my beloved and excellent wife, subject to the provisions hereafter declared, my whole estate, real and personal, and especially all real estate which I may hereafter acquire, to have during her life, but with full power to make sale of any part of the said estate, and to convey absolute title to the purchasers; and use the purchase-money for investment or any purpose that she pleases; with only this restriction, that whatever remains at her death shall, after paying any debts she may owe, or any legacies she may leave, be divided as follows: there are then limitations to his children and grandchildren. Held, The wife takes a fee simple in the real, and an absolute property in the personal, estate, and the limitation over of whatever remains at her death is inconsistent with, and repugnant to, such fee simple and absolute property in said real and personal estate, and fails for uncertainty." ALLEN, P., delivered the opinion of the court, in which all the other judges but SAMURLA, J., concurred. case was very ably argued by distinguished counsel, and their arguments are fully reported. They refer to all the material authorities bearing on the interesting question involved in the case, which was: whether a remainder over, limited on an express cetate for life, was rendered invalid by a power of disposition given to the tenant for life for her own use over the principal of the estate, . or any part of it?

We think that case was a much stronger one in savor of the limitation over than this case is. For there, the estate on which the limitation depended was an express estate for life; while here, it is a see simple and absolute estate. There, the limitation over was expressed in the will. Here, there is no allusion whatever to it in the will. If the limitation over in that case was repugnant to the estate given to the wise, d fortiers the limitation over in this case was repugnant to the estate given to the wife.

If the testator had forescen the death of his wife so soon after his death, without having time or opportunity, or being in a condition, to make a will, or had thought of such a contingency as likely to take place, he would no doubt have provided for it by his will, and disposed of the property among the heirs of both narties, according to what he knew to be the wishes of both in such an event. But he made no such provision; and whatever may have been the cause of the omission, this court cannot supply it. To do so, would be to make a will for the testator, and not to construe



and give effect to the will as made by himself. The latter is our only legitimate office. The former is beyond our power.

In every view of the case, therefore, we are of opinion that there is no error in the decree appealed from, and that it ought to be affirmed.

The foregoing opinion discusses many of the same questions involved in the case of Bond v. Tucker, ante, vol. 14, p. 477. Our note to the latter care renders it improper to pass over the same grounds which we have already there sufficiently considered. But we are gratified to be able to present the profession the views of an experienced Judge more in detail than was attempted in the former case. The grounds of the present decision are far more obvious and familiar to the profession than those in the former case, since every lawyer, at the present day, comprehends at first blush the general rule of law, that a will, made under a starute requiring all wills to be in writing, and executed before witnesses, cannot be controlled by any oral understanding with the testator in regard to the ultimate disposition of the estate embraced. It would, as urged by the learned judge, in his opinion in the principal case, be a virtual repeal of the statute, to allow the instrument to be enlarged, or in any way controlled, by extransous testimony. But the exceptions to this general rule, founded upon either fraud, or trust in procuring the will, in the particular form in which it was executed, through assurances made by interested parties under it, to use the estate for the benefit of others not named in the instrument, but intended by the testator to derive a benefit through the heneficiary named in it, are far more difficult to define. These exceptions are the same, and founded upon precisely the same principles, with the similar exreptions under the Statute of Frauds. They rest upon an implied trust growing out of an attempted fraud. The principle involved is, that the courts

will not allow any one to wreat the provisions of the statute, to the accomplishment of injustice, through the literal application of the terms of the same contrary to its spirit and intent. The principle is one which meets with much contradiction and criticism from thuse who desire to be left in possession of their ill-gotten gains; but it still maintains its ground against all the irony and reproach heaped upon it. So long as the courts base their exceptions to statutes upon the prevention of attempted francis, the public and the profemion are not likely to make any loud remonstrances, however loudly sciollsts and interested parties may remonstrate. There will always be found some men in all professions ready to sacrifice justice to symmetry, but in a healthy state of public sentiment they will have few followers.

It is upon the grounds before stated that courts of equity in England have controlled even the probate of wills when fraudulently obtained: Gingell v. Horn, 9 Simons 539; Lord HARD-WICKE, in Barnesly v. Powel, 1 Ves., sen. 119, 284, 287. But this will now be done, after probate, only in very extreme cases, and where otherwise there would be no remedy for the injustice otherwise perpetrated. The question is extensively discussed in Allen v. Mocpherson, 1 Phill. C. C. 133, by Lord LYNDRI'RAT, Chancellor; and the judgment affirmed in the House of Lords; 1 Ho. Isla. C. 191, where Lord Lyngnener thus enumerates the cases in which the courts of equity will intervene in questions of construction, or where the party is named as trustes, and where the Court of Probate could afford

no adequate remedy, or where one the testator. See 3 Reddeld on Wille name is fraudulently inserted in the will in the place of another intended by

59, 60, where the question is further dis-L J. R.

United States District Court, Western District of Missouri. united states « Adler & Furst.

The offence of failing to office and obliterate the marks, stamps and brands required by law to be open a package of distilled spirits at the time of emptying the package is complete without any intent to defraud, or any purpose to violate the lew.

If a person causes a package of distilled spirits to be emptied, it is a personal duty resting upon him to see that the marks, stamps and brands thereon, are efficed and obliterated at the time the package is emption, and responsibility for a failure to perform this duty cannot be shifted from himself by directing another to do the seme for him.

The owners and operators of a rectifying establishment engaging hands, furnishing materials and receiving the profits of the business, may be said to couse the emptying the distilled spirits used in their business by these in their employ,

A principal, who causes a package of distilled spirits to be emptied by an emplayer, is bound to see that the marks, stamps and brends thereon are effected and obliterated at the time the same is emption. If he trusts the performance of this duty to an employee, be does so at his peril, and if the employee fails to do k. such failure is equally the failure of the principal.

This was an indictment charging that defendants did empty, or caused to be emptied, certain casks, or packages of distilled spirita, without defacing or obliterating the stamps, marks and brands thereupon, at the time of emptying thereof.

The testimony showed that defendants were rectifiers at St. Joseph; that the process of rectifying was carried on by two employees of the firm, at a house some three or four blocks away from the firm's regular place of business; that these employees, Henry Korf and Charles Jagau, did all the work of emptying, and that defendants were neither of them present except on a few occasions; that a large number of packages of spirits were received from the distillery of Edward Sheehan & Son, and emptied by these employees, and that the stamps of these packages reappeared on packages subsequently sold by Sheehan & Son to other parties.

One of the employees, Korf, stated on the witness stand that he and Jagnu stole the stamps from these packages, and returned them to the distillery without the knowledge of defendants.

James. S. Beteford and H. B. Johnson, for the United States. MINER TO WALLE AND POP OF MINER PAR PAR A A. P. T. T.

KREEKL, J., charged the jury as follows:-- Under a statute of the United States regarding internal revenue, Adler & Furst, the defendants, have been indicted for failing to deface and obliterate from casks or packages of distilled spirits, at the time of emptying, marks, brands and stamps required by law to be thereon. indictment, in fifty-eight counts, charges this offence, varying in manner and the packages regarding which the omission occurred, so as to meet the testimony in the case. The United States Statutes, in sect. 8824, under which the indictment has been found, provide that " every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits from a cask or package bearing any mark, brand or stamp required by law, shall at the time of emptying such cask or package, efface or obliterate said mark, stamp or brand. * * * Every person who fails to efface and obliterate said mark, stamp or brand at the time of emptying such eask or package, shall be deemed guilty of felony, and shall be fined, etc."

I have cited such parts of the section only as bear directly upon the issues. You will observe, in the first place, that the section begins with declaring it to be the duty of every person who empties or draws off, or causes to be emptied or drawn off, any spirits, at the time of emptying such cask or package, to efface and obliterate said mark, stamp or brand. The object of the provision obviously was to secure the destruction of the mark, stamp or brand at the time of emptying; and the words "shall efface and obliterate" are apt words to express that intention. The language, "at the time of emptying such cask or package," leaves no room for construction as to the time when the act of effacing and obliterating is to be done. It must be done at the time of emptying and at no other time. The object in so providing was. no doubt to prevent the opportunity of defrauding the government by an improper use of the package or stamps, or both. however, will not require an impossibility, and if a case was presented in which the person whose duty the law makes it to efface and obliterate, without any fault of his own, was prevented from the discharge of the duty imposed on him, the law might excuse him. Such a case, however, is not before you, for there is no evidence tending to show even that the party upon whom the obligation to "obliterate and efface" rested was in any way interfered with or prevented from doing so. But the important inquiry is, upon whom; under the testimony before you, did the law impose

the duty of cancelling and effecing? Was it upon Adler & Furst, the defendants? And if so, are they responsible for the acts of their employees? In reading the clause of the section pronouncing the penalty as a separate and distinct part of the section, countenance may be found for the construction that the penalty was denounced against the person only who did the act of emptying. A close examination of the language of the part of the section denouncing the penalty shows beyond a doubt that it refers to the duty which the section in its beginning imposes, for it provides that every person who fails to effece and obliterate said mark, stamp or brand at the time of emptying, etc.

As we have already seen, the provisions of the section imposing the duty to efface and obliterate is of such mark, brand or stamp only, as are required by less to be upon casks or packages, and hence the language in the penalty clause—said mark, stamp or brand. To read the penalty clause without reference to the preceding one would leave us without any designation as to what mark, brand or stamp the law is applicable to. To read the provision providing the penalty, in connection with the clause imposing the duty of effacing and obliterating such mark, brand or stamp required by law to be upon casks and packages, gives us an intelligent reading of the statute.

But it does more. The construing of the duty and penalty slause together enables us to ascertain to whom the statute applies, namely: to "every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits." Such a construction, in entire barmony with the provisions of the statute, accomplishes its evident object to hold these responsible, among others, who cause the drawing off. This leads us to the question under the evidence whether a person or partnership engaged in rectifying and employing persons who empty distilled spirits from casks and packages bearing marks, brands and stamps required thereon by law, can be said to cause the emptying or drawing of of such spirits. The owners, possessors and operators of a rectifying establishment engaging hands, furnishing the materials and receiving its products, may be said to cause the emptying of spirits used in their business by those in their employ. And any failure on their part to efface and obliterate marks, stamps or brands at the time of emptying casks or packages of distilled spirits on which each or package marks, stampe and brands were required by law, or came the same to be done, such person or persons so enusing

stamp is amenable to the law. The jury are instructed that if they find from the evidence that Adler & Furst were rectifiers and carrying on a rectifying establishment in the Western District of Missouri; that they emptied or caused to be emptied by their employees, as explained, any distilled spirits from casks or packages bearing any mark, brand or stamp required by law, and failed to efface and obliterate said mark, stamp or brand, at the time of emptying such cask or package, as charged in the indictment, they should find the defendants guilty, otherwise acquit. It was the duty of Adler & Furst, the defendants, to efface or obliterate the marks, brands and stamps on emptying, or cause it to be done, and the failure of their employees to do what the law imposes as a duty on them does not excuse them.

Verdict, "Guilty on all counts except the first."

The offence charged in this case is a followy. The important question discannel by counsel and decided by the court was whether the accused could be guilty without a criminal intent. The broad principle was ably maintained by the counsel for defendants that there can be no crime punishable by law, unless there has been a criminal act or omission, and a criminal or unlawful insent, and this we find laid down as a fundamental principle of criminal law: United States v. Thomasson, 4 Biss. 99; Gikner v. Gerham, 4 McLean 402. On the other hand the counsel · for the government maintained that eriminal intent was no element of the statutory offence, and need not exist to render it complete. There has been no edjudication of the precise question arising upon this statute, but general pronciples were relied on as arcerted in numerous authorities: United States v. Toylor, & McLean 949; United States v. Distilled Spirits, 8 Ben. 352; Hunter 7. State, 1 Boad 100; Cliquet's Chempages, 8 Wall. 140; United States v. Whickey, 11 Int. Rev. Rec. 94; United States v. Tab Burrels, 11 Int. Nev. Bos. 3; Story on Partnership, & 166; Story on Agency, § 492; Cultier on Partner-MIP. 8 459.

The view maintained by the counsel for the government and sanctioned by the court, is not only in harmony with the plain wording of the statute, but derives support from many kindred provisions of the revenue laws of the United States and from their general spirit and policy. It may be profitable to make brief reference to some of the provisions. Section 8169 punishes the failure by any revenue officer to report to his next superior officer and to the Commissioner of internal Revenue his knowledge or information of all violations of the revenue laws of the United States or of francis committed against the United States under such revenue laws. Section 3242 punishes rectifiers, wholesale liquor dealers, retail liquor dealers, and manufacturers of stills failing to pay their special taxes. Bection 3239 punishes a failure through negligence to conspicuously post special tax stamp. Section 2256 punishes the failure of any nerson having any still or distilling apparates set up to register the same with the collector. Section 8239 punishes every distiller and rectifier fulling to give notice to the collector of the commonosment of his business. Section 2200 punishes the failure of every distilier to give a bond. Section 2079 panishes the failure of every distiller and rectifier to place a sign on his house. Hection \$318 punishes the failure of every rectifier and wholesale liquor dealer to keep books or to make entries therein. Hection \$340 punishes the failure of every brewer to keep books. Bection \$348 punishes the failure of a brewer to affix and entert the stamps on heer kegs.

The provision of the statute which was drawn in question in the above reported case belongs to the same class of provisions as those noted above, and they all form a part of that system of conventional rules adopted by the government for the collection of the revouse necessary to its existence and per-

petuity. These rules should be liberally construct so as to advance the high purpose for which they were enacted: United States v. Torrety-right Cases, 2 Ben. 43: Cliquet's Changuague, 8 Wall. 144; Taylor v. United States. 3 How. 210. The fact that the offence is declared by the statute to be a foliony, does not change the construction which it should otherwise resolve: United States v. Stants, 9 Nov. 41; United Sheles v. Thompson, 4 McLean St. The distinction between felenies and misdemeaners is, under Federal legislation and in the Federal courts, more notainal than real or practical.

M. B. Jourson.

United States District Court, Western District of Missouri. UNITED STATES a. BITTINGER.

A person is a witness within the meaning of the statute (Neviced Statutes U. S., § 5399) who has been designated as such either by the issuance of a subpusa or by the endorsement of his name on a complaint. The subpusa need not have been served.

A case is pending in a court of the United States in contemplation of said statute, when a complaint is indged with the United States Commissioner charging a violation of the laws of the United States.

Before any one can be said to have cudeavored to corruptly infinence a witness, he must have known that the witness had been properly designated as such.

This was an indictment drawn under section 5899 of the Revised Statutes:

"Every person who corruptly, or by threats or force, endeavers to influence, intimidate or impede any witness or officer in any court of the United States in the discharge of his duty, or corruptly or by threats or force obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished," &c.

James S. Botsford and H. B. Johnson, for the United States.

Willard P. Hall and Jeff. C. Chandler, for the defendant.

KREKEL, J., charged the jury as follows:—The statute aims at defining two classes of offences; first, the endeavor to improperly influence, intimidate or impede a witness or officer in the discharge

of a duty m any court of the United States by corrupt means, such as bribery, or by threats or force.

It contemplates a case in which an attempt is made to directly interfere with a witness, and to improperly and illegally influence him. A witness, in the meaning of the statute and under the evidence in this case, will be taken by you to be a person for whom a subposens had issued on part of the United States to appear before a U.S. Commissioner to testify on a charge for violation of the laws of the United States. A case, under the evidence before you, is pending in a court of the United States, when a complaint is lodged with a U.S. Commissioner charging a violation of the laws of the United States.

Before any one can be said to have endeavored to corruptly influence a witness, he must have known that the witness had been designated by the U.S. District Attorney, or the Commissioner, as one to be used as a witness.

The designation may be by the issuing of a subposena, or by the endorsement of his name on a complaint, designating the witness by name, as such.

If the jury shall be satisfied from the evidence, that defendant Bittinger knew that a subpæna had been issued for Ferdinand Rendelman, or that Rendelman's name was endorsed on a complaint charging the defendant named therein with an offence against the laws of the United States, and if they shall further find that he corruptly influenced the said Rendelman to secrete, or so dispose of himself as to prevent process to be served on him, and if the jury shall further find that Rendelman had knowledge that such was the intention and object of the defendant, they should find the defendant guilty under the first count of the indictment.

If the jury shall find that no steps had been taken, either by the U.S. District Attorney or the U.S. Commissioner, to designate said Rendelman as a witness, either by an endorsement of his name on the complaint, or the issuing of a subpossa, or that the defendant had no knowledge that said Rendelman had been to designated as a witness, before the alleged interference, you should find the defendant not guilty under said first count.

The second class of offences which the section of the law cited denounces, is "corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration

No particular class of persons are named in this last clause. The words "influence and intimidate," employed in the first clause, are dropped, and "due administration of justice in court" added, showing an intention to extend the application of the statute.

Applying the provisions last quoted to the 2d, 8d, 4th and 5th counts of the indictment, it will be necessary for you to find that the defendant, Bittinger, did some act or acts which obstructed or impeded the due administration of justice.

We have seen, so far as an interference with a witness who had a duty in the United States court to discharge is concerned, the offence comes within the first subdivision of the act. This being the case, the defendant, in order to be found guilty of obstructing the due administration of justice in any court of the United States, must have done, if not more, at least some act or acts in addition to those specified in the first subdivision of the statute we are considering, in order to find him guilty of having corruptly obstructed the due administration of justice.

There seems to be no other act of the defendant interfering with the due administration of justice testified to, than his interference with the witness Rendelman, and unless this interference can be construcd into an obstruction of the due administration of justice, there would seem to be no evidence supporting the last four counts of the indictment. It would be, to say the least, a very doubtful construction, to seek to bring the offence from under the first and more definite description, for the purpose of applying the more general provision to the second class of offences, and you are not to do so unless you are satisfied the testimony in the case will justify it. You will have to determine from the evidence whether e case is made out against the defendant on the 1st, or the 2d, 8d, 4th and 5th counts of the indictment. These last four counts charge the corruptly endeavoring to obstruct and impede the due administration of justice before the U.S. Commissioner and in the District Court.

There is but one offence charged to have been committed, and it is your duty to say, if you find the defendant guilty, under what count of the indictment, bearing in mind, that the first count charges the corrupt interference with the witness, and the four last the corrupt obstruction of the administration of justice in the Dietrict Court.

Verdict, "Guilty on all the counts."

The principal local uniat made by the that, as the statute only punishes the



have had a duty resting upon him which enold only have been imposed by the service of a subporta. In the case of The State v. Acyes, 8 Vt. 37, Chief Justice Ruberther, decided that if a person knew he was to be a witness in a public prosecution he was not only a trituces, but was in duty bound not to secrete himself, so as to prevent the service of process, and the authorities seem

to be conclusive to the effect that process need not actually have been served: State v. Carpenter, 20 Vt. 9: State v. Early, 3 Harrington 562; 2 Wherton on Crim. Law (7th ed.), § 2287; 4 Black. Com 126; 1 Bish. Criminal Law, § 665; 1 Russell on Crimes 183; 2 Bish. Crim. Pro., § 697; Commonwealth v. Reyn Ids, 14 Gray 87; State v. Biebusch, 32 Mo. 276.

H. B. Jourson.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF INDIANA.1

COURT OF APPEALS OF MARYLAND.9

SUPREME COURT OF PENNSYLVANIA.8

SUPREME COURT OF VERMONT.4

ARRITRATION AND AWARD.

Umpire.—By a paral agreement to submit a matter in controversy to the arbitration of two persons, it was stipulated that, in case they could not agree, they should select an umpire, and that the decision of such umpire and any of said arbitrators should be final, &c. Ileld, that the decision of the umpire was all that was required. If one or both the arbitrators had agreed with him, it would still have been the decision of the umpire: Sanford et al. v. Wood, 49 Ind.

BANKBUPTCY.

Plea of.—Plea in bar that since the commencement of suit, the defendants had been adjudged bankrupts, and the plaintiff had proved its debt in bankruptey, and that the bankruptcy proceedings were still pending. Iteld, bad on general demurrer: Brandon Manufacturing Cb. v. France, 47 Vt.

BILLS AND NOTES.

Partnership—Wunt of Authority—Defence against Bond fide Holders.
—Adams, a partner of Moorehead & Co., drew a note in favor of Whitten & Co., of whom also he was a member, and, after it was endorsed by the payers, endorsed the name of Moorehead & Co.; the note was sold to the plaintiff by a known bill-broker. Iteld, that these circumstances were not notice to the plaintiff that the endorsement was without authority: Moorehead v. Gilmore, 77 Pa.

[!] From Jas. B. Black, Eq., Reporter; to appear in 49 Indiana Reports.

^{*} From J. Shaaf Stockett, Eeq., Reporter; to appear in 41 Maryland Reports.

From P. France Smith, Esq., Reporter, to appear in 77 Pa. State Reports

. If the note had been affored by Whitten & Co., that would have been notice that Monrehead & Co. were merely accommodation endersors, and sufficient to put the plaintiffs upon inquiry: Id.

The broker was the agent of Whitten & Co. to well, and not of the plaintiff to buy; plaintiff was not bound to inquire by whom he was employed, nor would the broker, if asked, be bound to inform him: Id.

Each partner has the same right to raise money for the use of the firm by endomement of negatiable paper as to do so by means of paper already issued, and the public is not affected by the private restriction on the power of each partner: Id.

On the face of the note, it had come to Moorehead & Co., by endorsement of Whitten & Co.; that it was originally given by Adems for his individual debt was immaterial. The presumption was that the endorsement of Moorehead & Co. was in the usual course of business; Al.

Nothing but clear evidence of knowledge or notice, frend or mold fides can impeach the primit facie title of the holder of negatiable paper taken before maturity: Id.

Note taken in Payment of a Pre-existing Debt.—One who takes a negotiable note before maturity, at its full value, in payment of a pre-existing debt, in good faith, and without notice of anything that would invalidate it in the hands of the payer, is a bond fide holder for value, and not affected by any equities existing between the original parties: Russell v. Spletter, 47 Vt.

Warrant of Attorney to confess Judgment destroys Negotiability.— A note payable to order with interest, with an addition "in case of non-payment at maturity, five per cent. collection fees to be added;" with warrant of attorney to enter judgment for amount of the note and the five per cent., with costs of suit, release of errors, without stay of execution, waiving exemption, inquisition and condemnation, and to sell on A for: Medical not negotiable, by reason of the warrant of attorney contained in it: Sweeney v. Thicketun, 77 Pa.

BROKER. See Vange.

For Sale of Real Estate—Right to Commission.—Where the owner of real estate agreed with a real estate broker that he would pay him a certain amount if he would find a purchaser within a reasonable time, who would pay a certain price for his real estate, if within such time the broker procured such purchaser, he was entitled to recover his commission, though the owner of the real estate sold the same before the broker found the purchaser: Lane v. Albright, 49 Ind.

COMMON CARRIER.

Owners of Tow-boats are not.—The owners of a tow-boat are not common carriers; in an action by them for towing berges where, under a plea of set-off and payment, the defendant alleged that the tow was lost by the negligence of the owners of the boat, the burden was on him to show such negligence: Hage v. Miller, 77 Pa.

The defendant having given evidence tending to show that the less was from the negligence of the plaintiff's pilot and engineer, evidence that these officers were competent, skilfel and eareful, was inadmissible:

. . . - 1. econocities the the needleanes of his seconds in the

enume of their employment, without regard to their character for care or skill; except in the case of fellow-servants, or of a servant employed by him in some independent work. When an act or omission of defendant is proved, whether it be actionable negligence, is to be determined by the character of the act or omission, not by the defendant's character for care and caution: Id.

Bill of Lording—Construction of.—Where a milroad company received freight to be transported partly by rail and partly by water, and it was stipulated in the bill of lading, that "it is especially agreed and understood that the company is not responsible * * * for loss or damage on the lakes or rivers, unless it can be shown that such damage or loss occurred through the negligenous or default of the agents of the company;" and the freight, after being carried by the defendant, was placed upon a wharf-boat, awaiting the arrival of a packet wherein to ship it, and the wherf-boat sank without the fault of the railroad company, and the freight was lost. Itold, that the loss was not one occurring on the lakes and rivers within the meaning of the bill of lading. Iteld, also, that the bill of lading should be construed to mean, that the carrier was not to be responsible, in the absence of negligenoe, for loss or damage occurring in the navigation of the lakes or rivers: The St. L. d: S. B. Railway Co. v. Sanuch et al., 49 Ind.

CONFLICT OF LAWS.

Foreign Judgment for Alimony—Service by Publication.—A judgment for alimony rendered in another state, where the only notice to the defendant was by publication, and he did not appear, and the record does not show that he was a resident of that state, can have no force in this state: Middleworth et uz. v. McDowell, 49 Ind.

CONTRACT. See Umge.

Whether Entire or Separate—Rescission—Custom.—Defendant bought 4000 berrels of oil from plaintiff, and eight similar papers of same date were executed by them, each for the delivery of 500 barrels on the last day of consecutive months, payment to be made on each delivery. Itchi, not to be an entire contract: Morgan v. McKer. 77 Pa.

The plaintiff, on demand, refused to deliver the oil due on one of the appointed days; the defendant on the next day for delivery, gave notice of rescission, on the ground of the previous default. Iteld, the plaintiff might recover for refusal of defendant to accept and pay for the oil which was tendered on the days appointed for the subsequent deliveries: Id.

The right to rescind a contract must be exercised within a reasonable time after the breach. What is a reasonable time, is for the court: Id.

Evidence was inadmissible, that at the time of the purchase it was agreed that it was an entire contract, and that the several papers were executed with that understanding and according to the custom of the trade: M.

Nonetics.—C. purchased the defendant's millinery goods, and in part consideration thereof, agreed to pay the defendant's debt to the plaintif. C. thereupon wrote the plaintiff that her husband proposed to give his note on six months for said debt, and the plaintiff replied, accepting the

proposition The note was never given, but C. made remittances to the plaintiff from time to time, to apply on said debt. Held, a mere accord, and that the defendant was not thereby discharged from the balance of the debt: Rising v. Chumings, 47 Vt.

Waiver of a promise to pay the dobt of another that is without consideration and within the Statute of Fraude, or refusal to receive such

payment, does not discharge the original debter: Id.

COVENANT. See Loase.

CRIMINAL LAW.

Exidence—Character of Person amounted.—To make it competent he a party complained of for assault and buttery, to show that the person assaulted was quarrelsome and fractious, he must show that he had knowledge of such fact; for the theory upon which such evidence is admitted in, the influence which such knowledge may be supposed to exert upon the conduct of the party in preventing or repelling an assault: State v. Meader, 47 Vs.

Custom. Bee Contract; Evidence; Usaga.

DEBTOR AND CREDITOR. See Bills and Notes; Contract.

Application of Payments.—Payments made to a creditor helding demands both due and undue, without direction by the debtor as to their application, must, ordinarily, be first applied by the creditor upon the demands due: Early v. Flannery, 47 Vt.

Down. See Husband and Wife.

Duness.

Duren of Imprisonment—Rescission of Contract.—If one, claiming that he has purchased property, but knowing that he has not, maliciously, and without probable cause, suce out a writ in trover for it, for the purpose of frightening and coercing the owner to sell at to him; and the owner, being a man of ordinary firmness, is thereby induced, through fear of arrest and imprisonment, to make such sale, the sale is void for durens of imprisonment. Itchi, that it was not necessary, to make the defence of durens of reprisonment available, that the pretended vendor should have offered to rescind the contract, and return a note given for the purchase-money: Brownell v. Telectt, 47 Vt.

Assistance of Fromise for.—A premise exterted by terror or violence, whether on the part of the person to whom the promise or obligation is made or that of his agent, may be avoided on the ground of duress: Bask v. Brown, 49 Ind.

If a party execute an instrument from a well-grounded four of illegal

imprisonment, he may avoid it on the ground of duren: Id.

To a suit upon a promissory note, it is a good answer to allege that the plaintiff induced the defendant to go with him to a sociuded place, and there accused the defendant of having performed an abortion upon the plaintiff's wife, and that a certain person who was then present was on effect, having power to arrest and imprison the defendant, and that the plaintiff there threatened the defendant with immediate arrest and imprisonment, unless the note in suit was made, and fearing such arrest

the defendant made the note, and that he had never committed the crime charged: Id.

EQUITY.

Apportionment of Expense of Repairs among Joint Owners of Water-power—Costs.—It is the proper exercise of equity jurisdiction, to apportion among parties having a common interest in the use of a waterpower, and on whom rosts a common duty of maintaining the dam which creates the power, the burden and expense of such duty: Sanborn v. Bruley, 47 Vt.

One-third of the orator's costs of taking testimony disallowed, because

of unnecessary prolixity: Id.

EVIDENCE. See Criminal Law; Husband and Wife; Usage.

When Parol Evidence is admissible in cases of Written Contracts.—While parol evidence is inadmissible to alter, vary or contradict a written contract, it is admissible to prove an independent collateral fact about which the written contract is silent: Fusting v. Sullivon, 41 Md.

Where by a written contract F. sells his store, the stock of goods therein, his house, lumber-yard and lumber therein, barn and barn-yard to S. upon terms specified, parol evidence is admissible to show that it was verbally agreed between the partier during the negotiation, and before the contract was concluded, that S bought with the distinct understanding that F would not go into business in Catousville, the place where the store was located, and that the acquisition of the good-will of the store and the agreement of F. not to set up another store in Catousville, was part of the consideration of the purchase: Id.

Name—Idem Sonana.—A deed described the land thereby conveyed as being in "Lington," in the county of Addison. Ifeld, that the name "Lington." was so like the name Lincoln, a town in said county, and so unlike the name of any other town in the county, that the deed was properly admitted in evidence, in connection with other evidence showing the situation and circumstances at the time, as tending to show that the locus in que was the land conveyed by the deed: Armstrong v. Colby, 47 Vt.

Declarations against Interest.—In trover, the defendants claimed title to the property through B., who turned it over to them to scenre a then existing debt. IIrld, that the declarations of B. against his title to the property, made while it was in his possession, and before he assigned it to the defendants, were admissible against the defendants, and that they might be proved by persons other than B.: Alger v. Andrews, 47 Vt.

Tricgraph Dispatch—Secondary Evidence.—In an action against a telegraph company for damages for failure to transmit a dispatch, the original dispatch delivered to the operator must be given in evidence, or if not, its absence must be properly accounted for before accordary evidence thereof can be admitted: The Western Union Tel. Co. v. Hop-line, 49 Ind.

FORESON JUDGMENT. See Conflict of Lause.

FRAUDE, STATUTE OF. See Contract.

Promise to pay another's Dobt.—Long sold his interest in a firm to

his partner for \$700, the partner to pay all the debts of the firm; the \$700 being unpaid, the partner sold to Townsead, who, by parel, agreed to pay the amount due Long as the consideration. Hold, that the promise was not within the Act of April 26th 1855, seet. 1 (France), and Townsead was liable to Long on his promise: Townsead v. Long, 77 Pa.

The general rule is that a parol promise to pay the debt of another is within the statute, where it is colleteral to a continued liability of the

erizinal debter: Id.

If a parol promise be to pay absolutely or conditionally the debt of another, due or to become due on an existing contract, it is generally

within the Statute of Frauds: Id.

The consideration for the promise is important only where it is a transfer of the creditor's claim to the promissor, making the transaction a parchase, or where it is a transfer of a fund pledged, set apart or held for the payment of the debt: Id.

GIFT.

Imperfect.—An account was opened in a savings' benk to the credit of "James Cannon, subject to his order, or to the order of, Mary R. Cannon," his daughter; and money from time to time was thus deposited. Upon the death of James Cannon, Mary E. Cannon claimed that her father, in his lifetime, had given her the book of deposit with the money credited therein, to be held by her in trust for horself, and her brothers and sisters. The only mode in which money could be changed from one person's account to another's in the bank was " by a payment of the one account and a new deposit in another account." Upon a bill filed by the administratrix of James ('annon claiming the money is bank as belonging to his estate, it was IIrld, that the decrared had not parted with the legal dominion and control over the money standing in his name in the bank, because it was there subject to his order, or the order of his daughter; nor did the delivery of the book of deposit countitute a delivery of the money, and the complainant was therefore entitled to it as of the estate of her intestate: Murry v. Cannon, 41 Md.

HUSBARD AND WIFE.

Declarations at time of executing Drod—Conveyance in Franci of Dower.—In a proceeding to have a deed declared fraudulent and void as against the rights of the widow of the granter, his declarations to the conveyancer with respect to the deed, and his object and purpose in making it, being contemporaneous with its preparation and execu-

tion, are admissible in evidence: Banborn v. Lang, 41 Md.

A married man by a deed voluntary and without valuable consideration, conveyed nearly the whole of his property to his nephew. To the conveyancer who prepared the deed, he stated that his purpose was to deprive his wife of the property. The deed was executed on the 20th of May 1872, and recorded the same day in Baltimore. The grantee lived in New Hampshire and never had procession of the deed till after the death of the granter in July 1873. Before the deed was executed, a power of attorney was sent to the grantee and executed by him in New Hampshire, by which the granter was authorized "to sell and even

mentioned in the deed, who mortgaged to server it.

ad notes were sent to the grantee and by him were execue remained to presentes of the property embraced in
his death, the a bill field by the biders against the prodeed declared rotal as in fragel of her rights, it was the
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and enable and specula to deprive her or her legal rights
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INSULATION.

e displic to open of rea , such prost to made known to the company, and cap of Ibid, that said provinted was only foligatory when the nation largest of the immined in the property winds: Headita v. Andre Inc (in., of Va.

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rision was to the presencing of third parties, under an agreement with a defendants' producement in the trust. Maid parties continued inseration of the property during the plaintiff's form, and would necrosise to him. It did not appear that said parties were entitled underly agreement, to had as against the plaintiff, nor that they had as they this expension which they read rightfully keep him out. Mail, that they had at they are this expension with the plaintiff was not kept out by this chief and briter than his own this

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ction of province to an express province to pay to single bill berred by traductions, the single bill be so by the independent to, or so explemently of, and i gail basis of the express province; IV

MARRIE AND FREYART. See Common Carrier.

At the part of the parties of the second the second to be a contract to the second to be a contract to the second to be a contract to the second to the same took. There will be a merger of the simple contract, what he parties while it or and, for the two spatracts are incompatible, a people where one is intended to be simply collected to the other, it makes again together, and the higher make provide: Account to the other, if the fifth the simply collected to the other, it is also beginned to the beginned to the simple contract.

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ages for the killing of her husband by a collision of trains of the defendant, he being at the time in the employ of the defendant, the jury, in assessing the damages, if they find for the plaintiff, must extimate the reasonable probabilities of the life of the deceased, when injured, and give the plaintiff such pecuniary damages as will compensate her for losses already suffered as the direct consequence of her husband's death, and also for the prospective losses she will suffer as the direct consequence of such death during the period, the jury, under all sircumstances, shall does to be the probable duration of her life: Id.

PARTITION.

Mortgages of undivided Interest not a proper party to.—A mortgages of an interest in an undivided estate is not entitled to be made a party to a proceeding in partition; cannot do any act affecting the title or estate of his mortgager; nor can be object to partition by the parties themselves; if competent, they are not bound to go to law to make the partition: Long's Appeal, 77 Pa.

When partition is made, the accurity of the mortgage follows the

separation and attaches to the estate held in severalty: Id.

The mortgages may object to frund or unfairness affecting his interest; but if the partition be fairly made he cannot gaineay it: Id.

PARTNERSHIP. See Bills and Notes.

RAILROAD. See Negligence.

SHIPPING.

Repairs to a Vessel—Authority of Captain to pledge Owner's Credit—Authority of Owner to pledge Credit of his Co-owner.—The captain of a vessel, as such, has no authority to pledge the credit of the owner for necessary repairs made at the home port, where the owner resides, and can be consulted, and can personally interfere: Pentz v. Clarke, 41 Md.

And the fact that the captain is also a part owner of the vessel, gives him an authority to pledge the credit of his co-owner for such repairs. In order to bind the owner of a vessel for necessary repairs done at the home port where he resides and can personally interfere, the master must have special authority for that purpose; or the owner must have held out the master as having such authority; or he must have ratified the contract after it was made: Id.

SURETY.

Voluntary Payment by Surety.—When a surety pays a debt, he must be legally bound for it, to enable him to recover the amount paid of the principal, and the principal must also, at the same time, be under a legal obligation to pay the debt. Mollinsber v. Ritchey, 40 Ind

In an action of replevin, where a bond is filed and possession of the property obtained, and afterward the sust is dismissed by agreement of the parties, the plaintiff agreeing to pay the defendant a certain sum, but where no judgment is rendered, if the surety on the replevin bond afterward, without the request of the plaintiff, pay the amount agreed to be paid to the defendant, he can not recover the same of his principal, the payment being voluntary on the part of the surety: Id.

Fairness to Sarety—Duty of Sarety.—As a rule of law, strict integrity and complete fairness are due from the creditors of a debter to one who is about to become surety for such debtors; but this rule will not excuse the person about to become surety from resourchle attention to the circumstances under which he is called upon and resourchle difference to inform himself as to the prudence of the set he is about to do: Stelman et al. v. Boone. 49 Ind.

If a person who is asked to become surety for another is put upon his guard by the circumstances surrounding the party for whom he is asked to become surety, and can ascertain from the persons present all the facts necessary to shield himself from fraud, he should make the inquiry: Id.

Fraud must not be induced by the person who complains of it, nor

must he suffer himself to become an indelent victim: Id.

TRUST

Truster's Lien for Reimbursement of Expenses.—Trustees have an imberent equitable right to be reimbursed all expenses resembly insured in the execution of the trust; and it is immuterial that there are no provisions for such expenses in the instrument of trust: Renselser & Saratoga Railroad Co. v. Miller, 47 Vt.

All such expenses are a lien upon the trust property; and the trustee will not be compelled to part with the property tastil such expenses are

poid: Id.

UBAGE. See Contract.

Real Estate Broker—Universal Commissions—Usage or Contom sonnet control a well-established principle of Law.—When a real estate broker, employed to sell a farm, disposes of it by way of exchange for other real estate, he is not entitled to charge the owner of the latter a commission for effecting the exchange. The law does not permit the broker in such a case to act as agent for both parties. Even an agreement to pay such commission, could not be enforced by an action thereon: Raisis v. Clarke, 41 Md.

Nor could an action for the recovery of such commission he maintained, sithough by a custom or usage existing among brokers in the place where the exchange was effected, they were entitled in exchanges of real estate to a commission of two and a half per sont, from each party, on the amount or value of the property exchanged: M.

Custom of Tracio—Cannot control plain Language of Contract.—McKee, by written agreement, sold the coal on his form to defendants for 10 cents for each ton " of screened coal mined and removed from his land." The defendants mined and screened and removed both lump and nut coal. Held, that evidence was include to show that "screened coal" is understood amongst coal merchants and miners to include only lump coal; or to prove the relative value and quality of lump and nut coal for the purpose of showing that nut coal is not "screened coal," in its common acceptation; that at the time of the contract there was no market for nut coal, and that it was removed from necessity and did not pay expenses: Moreor Mining Ch. v. McKee, Adm'r, 77 Pa.

Although the meaning of a term used in a contract and arolled to an

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Defaulting Prochages at an Assessar's their, satisfied upon a fir sale of the property to the disspire Proceeds — An exceptor under see by visites of a power in the will of his testator, and certain real cotate, and the of a power in the will of his testans, and certain real estate, and the autochance manufact a division manufactum whereby he agreed and house bimosif to comply with the terms of acle upon the retification thereof by the Orphans' limit. The acle was reported to and finally ratified by, the court. The pushbaser having made default in a templalay with the terms of agic, the court to persuance of the provisions of the Act of 1870, on 64, ordered the property to be re-orid at his risk. The property was accordingly re-orid, and the amount bid at the re-orie exercised that hid be the first sole. The original purchaser thereupon claimed this excess, or so many thereof as might reduin after 12 minute of the first sole the resoluted by the exercise. This plates was resisted by the exercise. This plates was resisted by the exercise. This plates was sold as that of the first partitioner, and at his property at the pastilled in whatever between neight relating the property of the property at the property at the security the court and expenses in this first the property is the property of the property of the property in the property of the property and property the property of the property in the property of the property in the property of agie, including a resonable cas for periods or common in using the past-tion and procurry the accompty writers thereon for the resule; the exa-sator's commissions on the whole amount of the process of the resule, and the amount of the original purchase minuty with interest thereon from the date of the first rate to the time of the receipt of the nervisco-money by the executor from the purchaser at the recent rate. That the right of the nervisco-way affected by the fact that he was without moons of joyment, and had given no security for the payment of the payetype thinks, and winds bers been unable to pay the lime to the counts of the tentility. If the property had acid as the securit sale for less than the payers of the ariginal parchase: Missing v /ugs., of Ma

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the the time it was then assessment to be used, but a right to use the water in prometry as then ased, and for such length of time during the reason of aspectly as the ention and knotness of the util might require; and that if the food done in all house by the wheel substituted for the pacific it is sufficient to the first done in all house by the wheel substituted for the pacific it is built when the envenant was made, was as made as that done by the latter in twenty-free house, and with the use of sea water, there was the same in character as that lating done when the curenant was made; from the done that done the fact lating done when the curenant was made; from the done that have been used to present the plaintiff mechanicalance appeared had griet will be the had been used to appear to the plaintiff mechanicalance appeared had griet will be it ever had been appeared as defendants operated had griet will be it ever had been appeared as an extensive and with proper same, and used water which otherwise entit in asset the the plaintiff or had no made, and pare the defendants as notice that in grinding at their mill they were made in the defendants for notice that in money is the desired for appears the united of the deliver that it is definitioned to deliver that it was the method to appear the time definition and the water who when the plaintiff of the method when the water who when the plaintiff of the previous the plaintiff of the method was the while plaintiff of the strength we provide the plaintiff of the strength was the while plaintiff of the strength was the while plaintiff of the strength was the while plaintiff of the strength of the strength was the while plaintiff the strength was the while the made the while plaintiff of t

BOOK NOTICE.

PRACTICE AND PLEADINGS IN PERSONAL AUTIONS, in the Courts of Massachunetts, with Notes and Decisions on the Practice Act and a Selection of Forms. By Buswell and Walcorr, of the Suffolk Bar. 8vo, pp. 471. Bosten: George B. Roed.

. . We desire to call attention to this book, both for the very creditable monner in which it is executed, by the authors and the publishers, and also because it is upon a subject of the highest importance to the courts, as well as the profession. There is nothing which so much conduces to the quiet, orderly, speedy and understanding trial of actions, as to have the counsel fully instructed in the rules of practice, and according to our observation, there is no subject in regard to which there is, commonly, greater deficiency. We do not expect, that such a work will be found equally useful in other states, but there is much in the which will be found of great interest in every state, and especially where the practies is governed by a code, as is new very general throughout the country. And as all there codes are based upon that of New York, the differences are very olight. L. F. R.

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THE

AMERICAN LAW REGISTER.

FEBRUARY 1876.

LIMITATIONS ON TAXING POWER ARISING OUT OF THE SITUS OF THE PROPERTY TAXED.

1. Chattels.—It would seem to be an axiom that a state has no right to impose taxes upon persons or property beyond the limits of the state; its severeignty extends no farther. As to real estate, it has never been claimed that such property could be taxed by any state other than that in which it is situated. And the same rule seems to be applied to personal property; but the difficulties arise in the application of the principle. owner resides in one state and the property consists of goods and chattels which have an actual situs in another state, it is well settled that the owner is not to be taxed at his residence or demicile, for property situated in another state: Hopt v. Com're of Turca, 28 N. Y. 224; State v. Ross, 3 Zabriskie 517; Mills v. Thornton, 28 Ill. 800; Carrier v. Gordon, 21 Ohio 605; Blood v. Sayre, 11 Vorm. 609; Davenport v. Mississippi Railroad Co., 12 Iowa Generally the owner of property is taxed at the place of ble residence for all his personal property, but where the property has a visible and tangible existence, not at the domicile of the owner, and is permanently situated at another place, it is liable to taxation at the place of its situation. FIELD, J., in State Tax on Persignheld Bonds, 15 Wall. 828–4; Sangamon & M. Raibroad Co. v. Morgan County, 14 Ill. 168.

Yes XXIV.-9

It has been thought that the statute of Massachusetts, which defines personal estate for the purposes of taxation, to include "goods, chattels, money and effects, wherever they are, ships, public stocks and securities, stocks in turnpikes, bridges and moneyed corporations within or without the state," asserts the principle that all personal property may be taxed with reference solely to the domicile of the owner, and without reference to the situs of the property: Report of Commissioner Wells et al. to the New York Legislature on Tozation (1871), p. 81. But this view is not sustained by the courts of Massachusetts. A. resided in Manchester, in the state of New Hampshire, owned a building in Lawrence, Massachusetts, standing by consent on the ground of another. In the discretion of assessors, under statute in Massechusetts, it might be taxed as real or personal estate. It was taxed as personal estate and sold for default in payment of the tax. The purchaser was held a tresposeer in entering without A.'s concent. "If it was personal estate, it was not taxable in L., any more than a ship touching at the wbarf, owned by a resident of New York city: " Flanders v. Cross, 10 Cush. 614.

So, in constraing a statute making personal property liable to taxation "in the town where the owners hire or occupy manufactories, stores, shops or wharves;" it was held to apply to nonresident ewners of such property situate in the state of Massachusetts, whether they be individuals or corporations: Blackstone Manufacturing Co. v. Inhab. of B., 18 Gray 488; Leonard v. New Bedford, 16 Gray 292. DEWEY, J., in the latter case, says: "We are aware of the distinction between real and personal estate in respect to the loci rei site, and that the general rule as to the latter is that it follows the person of the owner, and in most cases in reference to taxes would be taxed in the place of the inhabiting owner. But as to goods, wares and merchandise, or any stock in trade, or any stock employed in manufacturing or the mechanical arts, where the business of seiling or manufacturing is carried on in this Commonwealth, it has not been thought a violation of comity to a sister state to tax such goods or stock in the town where they were thus made the subject of sale or monufacture."

The rule is clear and well settled as to chattels having an actual permanent situs, in a state different from the owner, but there is some conflict of authority in reference to debts where the evidence of debt or the property on which it is secured has a situs different

from the owner: in cases of collateral inheritance tax, of stocks of corporations owned by non-residents, bonds or stocks of state and municipal corporations, negotiable paper held by non-residents, steamboats, goods consigned for sale, and goods in transitu through a state.

2. Dobts.—Chattels are taxed where they are situated, but where is a debt situated? The creditor and the security for the debt may be in one state, the evidence of the debt in another, and the debtor in still another. Where the debt is not evidenced by negotiable paper, there are two views taken of the subject: one that the debt should be taxed at the residence of the debter, the other that it should be taxed at the residence of the creditor or owner. The weight of authority is with the latter view, that the situs of the debt is that of its owner, that it is not property in the state of the dobtor, but is property only where the owner residue: State Tax on Foreign-held Bonds, 15 Wall. 800; Johnson v. Oregon City, 8 Oregon 18; Com. v. Haye, 8 B. Monroe 1; Railroad 、 Co. v. Jackson, 7 Wall. 262; Collins v. Miller, 48 Ga. 886; Hunter v. Supervisors of Page County, 88 Iowa 876; Johnson v. City of Lexington, 15 B. Monroe 648. In the case first cited, the legislature of Pennsylvania enacted a law requiring the president, treasurer, or cashier of every company incorporated under the laws of the state, doing business in the state, and paying interest to its bondholders, should, before paying the same, retain from the bondholders or creditors a tax of 5 per centum, and pay over the same to the state treasurer semi-annually: 15 Wall. 802.2 It was held not to be a valid exercise of the taxing power, and that it violated the obligation of the contract between the corporation and the bondholder, who was not a resident of Pennsylvania. As to the bondholders resident in the state, it was a valid exercise of the taxing power, the bonds as to residents being property within the state. FIELD, J., says, "Debts owing by corporations, like debts

This case, criticised in 13 Walface \$16-19; rescouling disapproved, results affirmed; the fact that the mortgage recurring the bands was an property out of the state was unimportant; the important fact was that the creditor was out of the state.

^{*} CLIFFORD, MILLER, DAVIS and HUFF, JJ., dissented from the opinion of the court delivered by Judge First. Devemport v. The Mississippi of Misseuri Railroad, 12 Iowa 586, fally sustains 15 Wallace. Mortgages on real estate in Iowa, were held not to be taxable in the hands of non-resident helders. Tappen v. Morelant Matienal Bank. 10 Wallace 400, p. p.

owing by individuals, are not property of the debtor in any sense; they are the obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in To call debts property of the their hands they may be taxed. debtors is a misuser of terms. All the property there can be in the nature of things in debts of corporations, belongs to the creditors to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression could add anything to its obvious truth, which is recognised upon its simple statement. The bonds of the railroad company in this case are undoubtedly property, but property in the hands of the holders, and not property of the obligors. So far as they are beld by non-residents of the state, they are property beyond the jurisdiction of the state."

The views expressed in the authorities cited above accord with those in which it is maintained that the tax is upon the person, and not upon property, except in the cases of non-resident real estate and local assessments, the tax being a contribution levied by government upon its citizens, for its support, and that the property of the citizen was looked to merely as a measure of the contribution which it was just that he should make for that purpose. resident of Inwa deposited for safe-keeping in Illinois promissory notes for \$7000, that were nover brought into Iowa. They were held liable to be taxed in Iowa: Hunter v. Supervisors of Page Co., 83 Iowa 876, 879. MILLER, J., says, "It is not the notes as such that are taxed, it is the debt; notes are mere evidences of the debt; the right to money due being in the resident in Iowa, the property must of necessity be at the place where he resides, irrespective of the situs of the evidence." The same principle is contained in another large class of cases, where the question is, in what county or town a person shall be taxed for debts due from solvent debtors, where the creditor and the debtor reside in different counties, or where the creditor is in one county and the mortgage or other security is in another. In California, the statute requires all property to be taxed in the county where it is situated. A., residing in San Francisco, held a mortgage on proporty in Mariposa county; it was foreclosed and recorded in that county. It was held not liable to taxation in that county; the court saying: "The mortgage has no existence independent of the thing secured by it; a payment of the debt discharges the mortgage. The thing secured is intangible and has no situs distinct and apart from the residence of the holder. It pertains to and follows the person." People v. Eastman, 25 Cal. 608. So, the cash capital of a mercantile firm is taxed as personal estate, at the domicile of the owners: St. John v. Mobile, 21 Ala. 224. The residence of a banker is the place in which his capital as a banker is taxed. DAVIS, J.: "In such cases the maxim mobilia personam sequentur would apply, and by fiction of law the situs of the property would be the personal residence of the owner." Miner v. Village of Fredonia, 27 N. Y. 155, 156; Poople v. Supervisore of Chenango, 11 N. Y. 568. The same principle is decided in many other cases: People v. Whartenby, 88 Cal. 461; People v. Mc Creery, 84 Cal. 459; State v. Manchester, 1 Dutch. 581; St. Paul v. Merrill, 7 Minn. 258. What constitutes the domicile of a party, is a question sometimes of much uncertainty; for purposes of taxation the residence of a party liable to assessment for personal property will be deemed to continue where it has been until a change is affirmatively shown, (In the matter of Nichols, 54 N. Y. 66), and a change cannot be effected by intention alone. without actual removal: Stoddart v. Ward, 31 Md. 562. But where an inhabitant of a town removes to another town in the Common wealth, not intending to remain permanently, but with intention of not returning to his former home, and does not so return, he loses his domicile in the former town: Mead v. Reaberough, 11 Cush. (Mass.) 862. In case of death, the personal property of the decedent is taxed where he resided; it must have a situs somewhere, and none se appropriate during the settlement of the estate as the domicile of the late owner; but so soon as it is paid ever to the beir, legatee, or trustee under the will, then it is taxed at the domicile of the person to whom it is paid; Cornwall v. Todd, \$8 Conn. 448. A distinction is taken between domicile and residence: a person may have a domicile in one state and a residence in another; inhabitant implies a more permanent and fixed abode then resident, and frequently imports many privileges and duties which a more resident could not claim or be subject to: Supervisors of Tesowoll Co. v. Devenport, 40 III. 197, 204-5.

8. The opposite View and a Modification of the Rule. -- Where

N., a resident of New York, owned certain property, consisting of dobts due from solvent debtors, resident in Vermont, evidenced by promissory notes, and appointed an agent, residing in Vermont, to control and manage the proporty and collect and relend from time to time, as he should think proper, and allowed him a specified salary for so doing, it was held, the legislature had power to enact a law subjecting property so situated to taxation: Catlin v. Hall, 21 Verm. 152. It was claimed that the maxim mobilia personam sequentur was a legal fiction, adopted from considerations of general convenience and policy, for the bene-It of commerce, and to enable persons to dispose of their property, at their decease, agreeably to their wishes, without being embarreseed by their went of knowledge in relation to the laws of the country where the same is situated, and did not at all conflict with the authority of the state where property is actually situate, to make it bear its share of the burden of the government by taxation. The court say, "it is entirely just and equitable, that if persons residing abroad bring their property and invest it in this state for the purpose of deriving profit from its use and employment here, and thus avail themselves of the benefit and advantages of our laws for the protection of their property, it should yield its due proportion towards the support of the government which thus protects it."

The agents of George Parrish, a resident of Bohemia, had in their possession in the village of Ogdonsburg, N. Y., a large amount of household furniture in the mansion of their principal in the village, consisting of silver and plated ware, mirrors, books, pictures and wines, \$6000 in bank, contracts for the sale of land in the village nearly \$20,000, at the date of assessment. This property was held liable to taxation in the village: People v. Trustees of Village of Ogdonsburg, 48 N. Y. 890, 897-8. EARL, J.: "The contracts represent the debts occured by them. They are the subject of larceny, and a transfer of them transfers the debt. If this kind of property does not exist where the obligation is held, where does it exist? It certainly does not exist where the debter may be, and follow his person. And while, for some purposes in the law,

This case, as well as Boyt v. Chamberleners of Tasset, 28 N. Y. 224-206, everreled Wilson v. The Mayor of New York, 4 B. D. Smith, which adopted in its fullest copes the decicles that personal estate has no clear every from the event's decided.

by legal fiction, it follows the person of the creditor and exists where he may be, yet it has been settled that for purposes of taxetion this legal fiction does not, to the full extent, apply, and that such property belonging to a non-resident creditor may be taxed in the place where the obligations are held by his agent." So, where a person was domiciled at his death in Illinois, the helder of bonds of a private corporation of Missouri, which were transferred to Missouri for ancillary administration, the bonds were held liable to tax in Missouri. "The actual situs," say the court, "of personal property, and not the domicile of the owner, determines under the law of what state it shall be taxed:" St. Louis County v. Taylor's Administrator, 47 Mo. 594. And a party domiciled in Canada, dies there, owning personal property in North Carolina, ancillary administration is granted in North Carolina, and the personal property situate in that state was held liable to a succession tax: Alvany v. Powell, 2 Jones Equity 51. It is to be noticed that in the first two cases, while the actual owner of the debts was a non-resident, yet the evidences of debt, the agent of the creditor. and debtor were all in the state exercising the power to tex, and the investments were regarded as permanent; and in the last two cases, the person who held the legal title to the property was under the control of the state exercising the power to tax. They are not cases like those ante, sect. 2, where the simple question was whether the property should be taxed at the residence of the debtor or that of the creditor.

In Illinois, under a statute requiring "all property, real or personal, in this state, all moneys, credits, investments in bonds, of persons residing in this state, or used or controlled by persons residing in this state, shall be taxed, &c.," loans made by a person in that state were held liable under the following state of facts: (Supervisors of Taxowell County v. Devenport, 40 Itl. 197.)

D. was a man of mature years, unmarried, lived with his father in New York. He came to Pekin, in Taxowell county, every year, to loan money upon real estate, for himself, his father and other parties; the loans were permanent investments; principal and interest were reinvested on the same kind of county. The deeds were recorded in Taxowell and other counties, where the occurity was

[!] This case contains a fine discussion of the doctrine of the situs of personal property, and claims that the fiction that such property follows the person, has no application to revenue laws.

situated. While engaged in this business, Pekin was his headquarters; it was his post-office address; the banking-house of R. & Co., in Pekin, was his place of doing business generally. When R.: & Co. quit business, he kept his office and did business with L. & Co., in the same city; had a table and desk there for the transaction of business, kept his valuable papers, and sometimes money, in the safe of their bank. When he went east, he left his papers in relation to loans not completed and notes maturing during his absence, in the safe, and sometimes in the care of R. & Co. Most of the notes were taken payable in Pekin, and if payable elsewhere, actually paid in Pekin. This was all D. did while in Pekin; he gave his whole attention to it. He stayed from one to four months, never leaving while he had money on hand, remaining away only during the hot and sickly season, and then returning. The loans, amounting to \$250,000, were held liable to . tax in Pekin; it was thought that D. was a resident of the state in the sense of the statute.

4. Stocks of Corporations.—Stock means an individual interest in the dividends as they are declared, and a right to a pro rata distribution of the effects of the corporation at dissolution of the corperation. It is in the nature of a chose in action, has no locality, and of necessity follows the person of the owner; the tax upon it is in the nature of a tax upon income, which of necessity is confined to the person of the owner: Union Bank of Tennessee v. State, 9 Yerger 490; Angell & Ames on Corporations, § 458; McKeen v. Northampton County, 49 Penna. St. 519; Wultham v. Inhabitants of Woltham, 10 Metc. (Mass.) 834; Barrington v. Berkskire, 16 Pick. 572; Webb v. Burlington, 28 Verm. 188; Oliver v. Washington Hills, 11 Allon 268. In McKeen v. Northempton, the court say, " The defendant below, being a citisen of this state, it is clear he is subject personally to its power to tax, and that all his property accompanying his person, or falling legitimately within the territorial jurisdiction of the state, is equally within its authority. The interest which an owner of shares has in the stock of a corporation is personal. Whithersoever he goes it accompanies him, and when he dies his domicile governs its succession." City of Richmond v. Daniel, 14 Gratt. 885. SAMUELS, J., draws a distinction between stocks and credits, p. 889.

¹ This was a case of stock plotged to bank as colleteral security, taxed to owner not to bank. See opinion as to nature of stock, citing English authorities.

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In Iowa, shares of stockholders in corporations of that state, though owned by non-residents, are held liable to taxation in that state: Fuxion v. McCook, 13 Iowa 527, 530. The court says, "The interest of each shareholder is properly within the jurisdiction of the state. The certificate of shares may be with the person of the non-resident owner. But it is only paper evidence of such interest, the property it represents being within reach of the taxing power. The legislature has thought proper to provide that the property of this company, which has its existence by virtue of its enactments, shall bear its proportion of the burden of taxation in this way. Those who seek the benefit of this company do so with this understanding." At first blush this seems to sustain a different view from the cases just noticed, but a more particular examination will show that it does not. The decision was rem-, dered upon the construction of the following statute: "Corporations shall be taxed through the shares of the stockholders, and when stockholders are non-residents, their interest shall be taxed in the county in which is situated their principal business office, within the state." The statute recognises the distinction that the corporation is a person liable to taxation for its corporate property and privileges, and is entirely distinct from the individual stockholders, who are liable to taxation in the state of their residence for their property, including stock in this corporation. It is the corporation that is taxed, and the shares of stockholders are looked to merely as a measure of the tax, which it is deemed proper this corporation should pay. The tax is upon the corporation for the privilege of its existence in the state. The court distinguish the case from Davenport v. Mississippi of Missouri Railroad Co.: "the property is in the state, owned by the mortgagor, but the case does not decide that the property of mortgagor upon which the debt is secured, is not liable to tax, but that the debt secured owned by the non-resident shall not be taxed to the mertgages:" 12 lown 589. In Pennsylvania several late cases have extended the principle of Fazton v. McCosh, in such a manner as to entirely overrule the earlier case of McKeen v. Northampton County, already cited; Malthy v. Reading & Columbia Railroad Co., 52 Ponna. St. 140; Pitteburgh, Fort Wayne & Chicago Railroad Co. v. Commonwealth, 66 Ponna. St. 78; The Cleveland, Painceville & Ashtabula Railread Co. v. Commonwealth, 5 Casey 870.1 The first of these eases

¹ Those cases were everraled in State Tax on Phraise-hold Bands, 15 Wall, 300.

arose out of an act laying a tax "on mortgages, money awing by solvent debtors, whether by promissory notes, penal or single bill, bond or judgment," a section of which requires the officers of any corporation which pays interest on which a state tax is imposed, before payment of the same, to retain the state tax and pay the same to the treasurer of the state. Multby, a non-resident holder of cortain coupons, due before the passage of the act, presented them for payment. The company insisted on retaining the tax of three mills on each dollar of the bonds. Maltby brought suit, and the court held the company could deduct the tax. WOODWARD, J.: "There must be jurisdiction over either the property or the person of the owner, else the power of taxation cannot be exercised, but where the property is within our jurisdiction and enjoys the protection of our state government, it is justly taxable, and it is of no moment that the owner who is required to pay the tax resides else. . where. The duties of sovereign and subject are reciprocal, and any person who is protected by government in his person or property may be compelled to pay for that protection. * * * What would the plaintiff's loan be worth if it were not for the franchises conferred upon the company by the Commonwealth, franchises which are maintained and protected by the civil and military power of the Com monwealth? Then it would seem that this kind of property, more than any other, ought to contribute to the support of the state goverament, and I suppose it is upon this ground that the legislature discriminates between corporation loans and private debts as objects of taxation." These views are commented on by FIELD, J., in State Tax on Foreign-hold Bonds, 16 Wall. 822. "The amount of all which is this: that the state which creates and protects a corporation ought to have the right to tax the loans negotiated by it, though taken and held by non-residents, a proposition which it is unnecessary to controvert. The legality of a tax of that kind would not be queetioned, if in the charter of the company, or its certificates of loan, the liability of the loan to taxation were stated. The tax in that case would be in the nature of a license tax for negotiating the lean, for in whatever manner made payable, it would ultimately fall on the company as a condition of effecting the loan, and the parties contracting with the company would provide for it by proper stipulations." The error in the reasoning of WOODWARD, J., results from everlooking the distinction alluded to in commenting on Facton v. McCoch, between the corporation and the stockholders of

the corporation; the corporation being a creature of the state, it may prescribe the terms of its existence in the form of a bonus, a tax for the privilege of exercising its functious in the state, and that tax, as Judge FIELD says, may be in the form of a tax upon its loans. But the tax here was not a tax upon the corporation; it was a tax upon the creditors of the corporation, upon parties contracting with a corporation at a time when the state which ereated it had not burdened it with a tax upon its borrowing power, and was a violation of the obligation of the contract between the borrower and lender. The shares of stock in the National Banks are an exception to the rule stated in this section; the Acts of Congress as to them annul the general rule and impart to such shares for some purpose the local character and fixity of real estate. They are taxed where the bank is situated: Providence Inst. for Savings & Jewell v. City of Boston, 101 Mass. 576: Tappen v. Merchente' Nat. Bank, 19 Wall. 490. W. H. B.

Monrock, VA.

(To be continued.)

RECENT AMERICAN DEGISIONS.

Supreme Court of Errors of Connecticut.

CHARLES F. BOLLMAN v. CLARK M. LOOMIS.

The policy of the law ferbide that a person acting as the friend and confidential advisor of a purchaser, should at the same time be secretly receiving compencation from the seller for effecting the sale; and a contract for such compensation is void.

Assumptity, upon the common counts; brought by appeal from a justice to the Court of Common Pleas of New Haven county. The following facts were found by the court:

In the latter part of the year 1872, Mrs. W. C. Robinson called at the store of the defendant to look at planes which he kept for sale. She saw there one which pleased her, so far as the outside appearance was concerned, but not being willing to purchase entirely upon her own judgment, it was suggested that the plaintiff, who was a friend of F. A. Robinson, a brother of her husband and an acquaintance of hers, should examine the instrument. The plaintiff was to some extent an expert, and his judgment was much relied upon by the Robinsons. Before this time the

plaintiff had been an occasional visitor at the store of the defendant, and was well known to the defendant as an expert. plaintiff and F. A. Robinson visited the store of the defendant together, and the plaintiff, in the presence of the defendant, examined the piano, and found the tone to be good and the instrument a good one, and so expressed himself. His opinion was communicated to Mrs. Robinson. The plaintiff did everything to this point of time in the utmost fairness and good faith towards the Robinsons, and gave them the benefit of his unbiased judg-Mrs. Robinson did not however immediately purchase, and the plaintiff afterward happening in the store, the defendant asked him why Mrs. Robinson did not buy the piano. The plaintiff told him that he did not know, and explained the relation he sustained toward the Robinsons. The defendant knew that he was acting for the Robinsons, and that the Robinsons relied upon his judgment, and for this reason he requested him to go further than he had before gone, and to encleavor to effect a sale, and to arge the piano upon the Robinsons. This the plaintiff promised to do, and did. A sale was effected, and the plaintiff's exertions and recommendations were instrumental in effecting it. Neither of the Robinsons at any time knew that the plaintiff was acting for the defendant, and the plaintiff acted for the Robinsons merely as a friend, without reward or pay. After the sale was effected the plaintiff domanded payment for his services, and the defendant then denied that he had ever employed him; but the parties finally settled upon the sum of 820 as the amount to be paid.

Upon these facts the court rendered judgment for the plaintiff for \$20 damages and his costs, and the defendant brought the the record before this court by a motion in error.

Newton and Arvine, for the plaintiff in error.

Bollman, for the defendant in error.

FOSTER, J.—The principle involved in this case is doubtless of importance; but the amount involved, pecuniarily, is small; so small, as in our opinion hardly to justify bringing the matter here to be decided.

There was gross duplicity on the part of the plaintiff in acting as the confidential friend and adviser of the purchaser of the piane, and at the same time as agent of the vendor, employed by him expressly to effect a sale.

The party proposing to purchase was deceived. Instead of getting, as he supposed he was, the opinion of the plaintiff as an expert, without bias and without interest, acting merely as a friend, the plaintiff was in fact acting as the agent of the owner, and charging fees for his services. A sale having been effected through his influence, this suit was brought to obtain a compensation.

We think there should be no recovery. We reach this result not out of any regard for the defendant; he is as fully implicated in the deception practised on the purchaser as the plaintiff himself. The rule in such cases is, that the law leaves the parties where it finds them. The transaction was inconsistent with fair dealing, contrary to sound policy and offensive to good morals.

We do not say that the plaintiff or defendant committed a pesitive fraud. The plaintiff may have said nothing as to this piane which he did not believe to be true, and the defendant may have demanded and obtained for it no more than it was really worth. But the means resorted to to effect the sale, deceived the purchaser, and were in violation of confidence. Such contracts and acts are deemed equally reprehensible with positive fraud. They are within the same reason and mischief as contracts made and acts done with an evil intent, and are therefore prohibited by law.

Cases of this character, though differing widely in their details, are unforunately not rare in courts of justice. In Carter v. Beckm, 8 Burr. 1910, Lord MANSFIELD said: "Good faith forbids either party, by concealing what he privately knows, to draw another into a bargain from his ignorance of that fact and his believing the contrary." In Chesterfield v. Janssen, 2 Ves. 158, s. c. 1 Atk. 852, Lord HARDWICKE said: "Fraud may be collected or inferred, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons, not parties to the fraudulent agreement." In Fuller v. Dame, 18 Pick. 481, Chief Justice SHAW said: "The law avoids contracts and promises made with a view to place one under wrong influences; those which offer him a temptation to do that which may affect injuriously the rights and interests of third persons." And again: "If such advice and solicitation, thus understood to be pure and disinterested, may be justly offered from mercenary motives, they would produce all the consequences of absolute misrepresentation and falsebood."

This case comes within a class of cases described in the books

Wyberd v. Stanton, 4 Rep. 179, is directly in point. That was an action of assumpsit for goods sold and delivered. The plea was the general issue and set-off. One part of the set-off was for certain poundage and reward before that time agreed to be paid, and then due and payable from the plaintiff to the defendant, upon and in respect of certain goods and merchandise before that time seld and delivered by the plaintiff to one Andrew, for and in consideration of the defendant's having recommended the said Andrew to buy the said goods and merchandise from the plaintiff. Upon this being stated, Lord Ellemborough said he thought this demand could not be supported. It was a fraud on third persons. It was accordingly rejected.

We think this principle a salutary one, and applicable to this case. There is therefore manifest error in the judgment below.

There is no principle of the law of contracts of more vital force than that which requires that the same party shall not be interested or not, either as principal or agent, upon both sides. It is but the adoption and enforcement of that fundamental rule of Christian othics, " ye counct serve two mesters." The rule extends to a large number of those logal relations, resting upon confidence, trust and dependence upon one side, and advice, direction, superiority and control upon the other. Thus an agent will not be allowed to buy or sell for his principal, of any corporation or joint stock company in which the agent is interested, without acquainting his principal with all the facts known to himself, and allowing him to judge for himself, the principal being of full ago and compotency to act understandingly and pradentig: Tagler v. Salmen, 4 Myl. & Cr. 130. So one cannot make a binding contract where he acte as the agent of both parties: N. Y. Central Inc. Co. v. Nat. Protesties Inc. Co., 20 Barb. 470, where the cases are very extensively elted and judiciously analyzed by Mason, J. And in the very recent case of Reisin v. Clark, 41 264. 190, the court hold that a real estate broker, who was omployed to sell a property, and effected

an exchange for other real estate, could not charge the owner of the latter a commission. The law does not permit the broker in such case to act as agent of both parties even by express agreement. Such an agreement would not be enforced; and a custom of brokers to recoive a half commission from each party in an exchange, was held void as against a settled principle of law. So the trustee cannot become interested in the purchase of any portion of the trust estate : Parkhurd v. Alexander, 1 Johns. Ch. 504 And the purchase of any portion of the bankrupt cotate by the assignee will be treated as a trust for the benefit of the creditors: Ec parts Lucey, 6 Ves. 625. And the same rule will extend to executors and administrators, and to all persons acting as trustees for sale. And the surety is not allowed to purchase the debt for his own benefit, but it will enure to the bouedt of the principal debtor: Reed v. Norris, 2 Myl. & Cr. 874. So an agent who discovers a defect in the title to land of his principal cannot presure the title for himself: Rings v. Binns, 10 Pet. (U. S.) 900. The principle of there cares is now universally recogsteel. It is very learnedly discussed by two eminent English chancellors, in the Mone of Lords, Turnsow and Lovessenetes, in the early and leading case of York Building Co. v. Machonsie, 8 British Parl. Cases, in App.; 8 Paten 878. The rate extends to directors in point stock corporations, so that they cannot legally derive ony personal bouoft from any of their transactions on behalf of the company : Great Lasymbourg Ry. v. Magnag, 25 Beav. 306; 4 Jur. N. S. 880. A director cannot recover for work erected for the benefit of the company, if he was himself latertotal in the contract: Steers T. Southend Gas Light & Cabs Co., 9 C. B. H. S. 190₁ 7 Jur. N. S. 447.

The rule extends to the avoiding of all contracts procured by taking advantage of the relation of attorney and eligible moralising, we face to be supported by taking advantage of the relation of attorney and eligible moralising, we face to be supported by taking advantage of the relation of attorney and eligible moralising, we face to be supported by taking advantage of the relation of attorney and eligible moralising, we face to fraud and corrupt to show that the pensation in the minds our day, perhaps in all transaction was entirely equal and fair:

Lydden v. Moss, f. Jur. N. S. 686; more or less countenantage of the procure time to the pensation between attorney and elicate relations, upon the pensation between attorney and elicate relations, the latter of the pensation of the pensation of the minds our day, perhaps in all the relations, the latter of the pensation of the pensation of the minds our day, perhaps in all the relations, the latter of the pensation of the minds out the minds out the pensation of the minds out the pensation of the minds out the minds out the pensation of the minds out the pensation of the minds out the minds out the pensation of the minds out the pensation of

We need not here pursue this question forther. The elementary backs and the reports abound in wise rules and much beautiful moralising upon them. The rule le even more stringent ne between trusted and easted que trust, then between atterney and client, where we have seen it is only required to show the transaction fulr; but in the former case the come is equally vold, at the election of certal que trust, even where it appears that no advantage was taken: Chas v. Lord Allen, 2 Dow 200. Ld. Buccousin. Chanceller, in Huster v. Athins, 8 Myl. & K. 118, puts the case of atterney and eilent upon the same ground, and we see no reason for any distinction in the coace. But, as we said, after much beentiful moralising, we fur this very aresue to fraud and corruption is one that it will be found, practically, most difficult to close up. More rules of law, or morality, seem to not as a bind of compensation in the minds of too many in our day, perhaps in all times, for giving more or less countenance to enceptional iniquities, upon the principle that all rates must and will have some encoptions, till the latter everbelease and

L 7. R.

Supreme Court of Errors of Connecticut. HUNGERFORD'S APPEAL PROX PROBATE.

A former recovery, to become a bar, must be for the same asses of action, but not necessarily in the same form of action.

Thus was a claim presented to the commissioners by the appoint as follows:

"Hetate of R. D. Hicks to Dans L. Hangerford, Dr.
"February 1st 1870, to my services in your business, ondescring to sell the Clark House in Winsted, from the
1st day of December 1860, to the 1st day of February
1870, and such expenses in said business,
\$1900."

The appellant offered evidence, and proved, that between the 8d day of December 1869, and the 9th of February 1870, he devoted several days of his time in the service of Hicks, during his lifetime, in endeavoring to sell a hotel owned by Hicks in the town of Winsted, called the Clark House, which services were worth \$10 per day, and that during the time he expended in necessary expenses in the business the sum of \$75.

He further offered evidence, and proved, that on the 8d day of December 1869, he entered into the following written contract with Hicks:

"Winsted, Conn., Dec. 8d 1869. Whereas D. L. Hungerford has proposed to find some person or persons who will purchase my hotel, called the Clark House, in Winsted: Now I do hereby agree that if he shall find or send any person or persons who will purchase said property at any terms to which I may assent, and I shall thereupon make the sale to such person or persons, I will pay him, the said D. L. Hungerford, as a compensation for his services in the matter, the sum of \$1000, when said sale is effected.

R. D. HICKS."

In connection therewith he offered evidence to prove that Hicks, in the latter part of December 1869, or in the first part of January 1870, sold the Clark House to one Dennis W. Stevens, and after the sale concealed the fact from the appellant, and said to the latter "you are doing well, go on and make a noise about the property; it must be sold before the 1st of April." And that, from this time, which was the 18th of January 1870, the appellant continued his efforts to find a purchaser for the property, until the 7th day of February 1870, during which time he expended considerable sums of money in the matter.

The appellos claimed that the appellant was barred of a recovery for his services and expenses by reason of a judgment heretofore rendered by the Superior Court between the parties (which case came to the Supreme Court and is reported in 89 Conn. Rep. 259), but the appellant claimed that he ought not to be barred by that judgment, as it was rendered solely upon the question whether he was entitled to recover the sum of \$1000 by virtue of the written contract, and the appellant claimed that the court, in proceeding to and rendering the judgment, did so entirely upon the written contract, and that he did not offer any evidence or make

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any claim to recover for the services and expenses now claimed by him and that the court did not pass upon his present claim, and in proof of this he offered in evidence the record and files in that case. The record showed that the declaration in that action contained a special count upon the written contract above stated, and a general count for work and labor, and for money expended, and that the judgment was a general judgment for the defendant.

The court was of opinion and decided that the appellant was barred from recovering upon his present claim for services and expenses by reason of the judgment, and thereupon rendered judgment for the appellae. The appellant filed a metion for a new trial for error in this ruling of the court.

F. L. Hungerford (with whom was Graves and Morrill), in support of the motion.

Hitchcock, contrit.—The claim sought to be enforced in this proceeding is res adjudicate. The case of Hungerford v. Hicks, 89 Conn. 259, was tried in the Superior Court. It was an action of assumpsit, embracing a special count founded on a special contract, and counts for work and labor, and for money laid out and expended for the defendant at his special instance and request. To this action Hicks pleaded the general issue. So the parties were at issue on the question, whether or not Hungerford had any honest claim against Hicks for labor done and performed, or the money laid out and expended for him at his request. And that is the very issue involved in this proceeding between the same parties.

We say, therefore, that in the declaration in the action of sessinguit, between these same parties, Hungerford had appropriate counts for this claim; that he there declared that Hicks was indebted to him for work and labor, and for money laid out and expended; that Hicks by his plea denied this; that the parties were thus legally and fairly at issue as to whether Hungerford had any such claim against Hicks; that Hungerford introduced proof to satisfy the court of the truth of this claim; that the court rendered judgment, generally, against Hungerford; and that Hungerford moved for a new trial, on the ground that the Superior Court did not render judgment in his favor on this identical claim, under the common counts in his declaration. Is not, therefore, this claim res adjudicate? "Parties will not be permitted to litigate what

they once had an opportunity of litigating in the course of a judicial proceeding; but whatever might have been put in issue in that proceeding shall be concluded to have been put in issue and determined:" McDowall v. McDowall, 1 Bailey's Eq. Rep. 324.

PARDEE, J.—It is a well-settled principle of law that whenever a court of competent jurisdiction has judicially tried and determined a right or a fact, the judgment thereon, so long as it remains unreversed, shall be conclusive upon the parties and these in privity with them in law or estate.

This trial and determination must be upon pleadings wherein is an averment of a fact precisely stated on one side and traversed on the other, and found by the court or jury affirmatively or negatively in direct terms, and not by way of inference. Such a result would be obtained where an issue is reached by special pleading; rarely, when the general counts in a declaration are met by a general denial.

In our modern practice it is usual to insert several general counts in a declaration: and when the general issue is pleaded to these many different claims may be tried. When upon pleadings thus framed a general judgment is rendered, and is thereafter pleaded in bar, it is primd facie evidence of a prior adjudication of every demand which might have been drawn into controversy under it; but, like other primd facie evidence, it may be met and controlled by other competent evidence tending to show that any particular demand or claim was not presented or considered: Saw-yer v. Woodbury, 7 Gray 490.

In Kennedy v. Scovil, 14 Conn. 68, this court said, that, "in order to constitute a former judgment an estoppel, or in other words, to render it conclusive on any matter, it is necessary that it should appear that the precise point was in issue and decided; and this should appear from the record itself." And, in Dickinson v. Hayes, 81 Conn. 428, the court say: "Where two or more distinct causes of action are sued for in the same declaration and there is a general verdict and judgment for the plaintiff or a judgment for him on default, the record of such judgment is not conclusive evidence that both or all of those causes of action have been passed upon or adjudicated. Thus, in Section v. Tutop, 6 Term Rep. 607, the plaintiff sued upon a promissory note and also for goods sold. The defendant suffered judgment by default, and

upon executing the writ of inquiry, the plaintiff being unprepared with evidence regarding the goods, took his verdict and judgment for the note only. In a subsequent action for the goods it was held that the judgment in the first suit was no bar to the plaintiff's recovery in the second, and that the plaintiff was at liberty to prove what took place at the first trial for the purpose of showing that his verdict and judgment then, did not include the price of the goods saed for now."

The right of the appellant to recover \$1000 from Hicks upon the special contract may have been the issue which was tried and determined in the original suit; the same is true of his right to recover the reasonable value of his services upon the direction of Hicks to "go on and make a noise about the property;" also, of his right to recover for money laid out and expended for and at the request of Hicks, the record, showing merely a general judgment for Hicks, leaves it wholly uncertain, without other evidence, whether or not the right of the appellant to recover the claim which he has presented to the commissioners was put in issue, tried and determined in that suit.

Upon these principles, the record in question cannot be deemed conclusive for the purpose for which it was offered in evidence. The appellant is entitled to the privilege of showing that the claim which he now presents was not put in issue, tried or determined in the original suit

There is error in the judgment complained of, and it is reversed. In this opinion the other judges concurred.

It seems to be well settled, as a general rule, that a former recovery for the same sense of action, is to be regarded as an equitable defence, and need not be specially pleaded under the old rule of pleading, requiring estoppels by reased to be specially pleaded, under penalty of being regarded as waived by the party: Stafford v. Clark, 2 Bing. 277: Gray v. Pingry, 17 Verm. 419-428. A former recovery for the same sense of action to as much an equitable defence as payment or accord and satisfaction, and no more subject to any special stringency in pleading.

And we may here state that by the

always that each particular of the items of the former recovery, and the present action, shall be precisely identical. As one entire source of action cannot be so subdivided as to maintain separate actions upon the different items, it follows that if the former judgment embraces any of the items in the present action, it will be a ber to the subsequent suit. Thus a conviction for a common assault will ber any feture prosecution for the same assemit, with intent to kill, or to commit rape : Re Thompson, 9 W. R. 200. This point was involved to some extent in the recent Baglish case - Wemgre v. Hopkins, 23 W. R. 691; L. R. der one statute was held to be a har to another for the same offence, although in a different form and under a different statute. This view is decisive of the only question actually raised in the principal case.

The dictum, that where the former adjudication is relied upon as an estopped in regard to particular facts, it must appear by the record in the former action that such facts were in issue and directly passed upon, and the estopped must be so pleaded, is well settled: Vosgit v. Winch, 2 B. & Ald. 648; Outram v. Morewood, 3 East 345; Hopkins v. Lee, 6 Wheston 109; Fairman v. Bacon, 8 Com. 418; Gray v. Pingry, supra.

It is said in some cases that where the question was, in fact, determined in the former action, but that does not appear upon the record, and where of source it cannot be pleaded as an estoppel of record, it may nevertheless be

given in evidence in any subsequent action between the same parties, where the same facts are involved, and will have such weight as the triers choose to give it: Vooght v. Winch, supra; Outran v. Morewood, Gray v. Pingry, supra. The precise effect of such a new finding, when acted upon in a subsequent action, seems not well settled. Our own views were expressed in the case last cited, and need not be repeated. And it is well settled that a judgment-bond upon specific recitals upon the record will not, as matter of course, prove such recitals to the full extent, but only so far as is requisite to uphold the judgment : Burlen v. Shannon, 99 Moso. 200; Phil. Ev., ch 2, § 2; Hotchties v. Nichele, 8 Day 138; Coit v Tracy, 8 Conn. 206; where it is said: "Facts found by a former decree, which were not necessary to uphoid the decree, do not conclude the parties." 1. F. B.

Supreme Court of Errors of Connecticut.

ABIGAIL HANFORD D. HARVEY FITCH AND OTHERS.

The petitioner in 1820, then a married woman, joined with her husband in mortgaging for his debt a piece of land owned by her, soon after which she removed with her husband from the state, and they continued to reside out of the state until 1869, when he died. Immediately after the execution of the mortgage, C., a crediter of the husband, attached his life-interest as tensuit by the curtesy in the land, and afterwards had it set off to him in part satisfaction of the judgment which he obtained. In 1822, C. purchased the mortgage interest, taking a quit-claim of the land from the mortgages, and three months after he conveyed the land by a warranty deed to a purchaser, from whom by sundry conveyances the land came in different parcels to the respondents. The land was originally of little value, unfitted for cultivation or for building purposes, but the respondents had at great expense graded and erected houses and other buildings upon it. At the time C. made the conveyance he was in actual possession of the land, but it did not appear when he took possession per whether under his mortgage title or that derived from the levy of his execution. Ho interest upon the mortgage debt was ever paid by the petitioner or her husband, nor was any attention given by either of them to the property before his death. After his death, the petitioner inquired about the p. sporty and demanded possession, which being refused she brought a bill in equity to redeem. Held, 1. That if C. was to be regarded as having taken possession under the lavy of his execution the petitioner would not be barred by the

Statute of Limitations. 2. But that, in the absence of any evidence on the subject, and after so great a lapse of time, the court would presume that he had abandoned his claim under the levy and had taken presention as mortgages. 3. That his possession as mortgages, and that of these deriving title from him, being adverse to the petitioner, she would be barred by the Statute of Limitations. (Two judges dissenting.)

A married woman who executes a mortgage of her land with her husband, is not saved by her coverture from the running of the Statute of Limitations against her title in favor of the mortgages.

BILL to redeem mortgaged premises and to remove a cloud from a title; brought to the Superior Court in Fairfield county. The following facts were found by a committee:

In 1812, the petitioner was married to one Zalmon Hanford, with whom she lived thereafter till his death, which took place in 1869. There was issue of the marriage born alive, and capable of inheriting the property hereinafter mentioned.

In 1818, the land in question was conveyed to the petitioner by David and Silas C. Lockwood, who were the lawful owners of the same. The consideration for the conveyance was the sum of \$550, which was paid out of the proceeds of a prior sale of real estate belonging to the petitioner, and which she had inherited from her mother.

On March 14th 1820, Zalmon Hanford was indebted to Eli B. Bennett of Norwalk, by his promissory note of that date, in the sum of \$224.08, payable on demand, with interest, the consideration of which was dry goods, groceries and provisions, before that time sold by Bennett to Hanford, as supplies for his family; and to secure the payment of the note, the petitioner and said Zalmon on that day executed and delivered to Bennett a mortgage of the land in question, which was on the same day recorded in Norwalk.

Very soon after the execution of the mortgage, the potitioner and her husband left Norwalk, and went to reside in the state of New York, where they lived about thirteen years, and then removed to Ohio, where they remained until about the year 1848, and then removed to the state of Illinois, where they resided till his death, and where the petitioner still resides.

Neither the petitioner nor her husband ever had any actual personation of the land after their removal from Norwalk, and Bonnett never took possession. At the time of their removal it had been sultivated only to a limited extent, and no buildings had been arcoted upon it.

On the 14th of March 1820, said Zalmon was indebted to one Samuel Cannon of Norwalk, by his promissory note for \$100, which was executed and dated December 9th 1815, and on said 14th of March 1820. Cannon commonced a suit upon the note, by a writ of attachment, which was served by attaching all the right and interest of said Zalmon in the land in question; the attachment being subsequent to Bennett's mortgage. The writ was returnable to the county court for Fairfield county at its April Term 1820, at which term Cannon recovered judgment by default against said Zalmon for \$114.20 damages and \$9.70 costs; on which judgment execution was taken out in due form, and on the 19th of August 1820, levied on his interest in the land, which was appraised at \$55.92, and the same was set off in favor of Canmon, in part satisfaction of the execution; and the execution, with the endorsement of the officer's doings thereon, was, on the 29th day of Angust 1820, duly returned to court. There was no evidence that the execution was ever recorded by the clerk of the court, unless the same was to be implied from the facts found: and if, in the opinion of the court, the recording was to be inferred from the facts found, then the recording was found as a fact, otherwise not.

Cannon entered into possession of the land at some time between the levy of the execution and 18th June 1822, but the evidence did not enable the committee to fix the date of his taking possession, nor the title or claim of title under which he entered into possession, unless the same could be implied from the facts found.

On March 18th 1822, said Bennett gave to Cannon a quit-claim deed of that date, of the land mortgaged to him by the petitioner and said Zalmon. The consideration paid by Cannon to Bennett for the deed was \$244.81. The amount then due on the mortgage-note was \$251.11. Upon the payment of the consideration, the mortgage-note was delivered to Cannon, with the quit-claim deed, but the mortgage was not delivered, and no other writing or assignment was made between Bennett and Cannon. At the time of this transaction nothing had been paid on the mortgage-note, either upon the principal or as interest, and Bennett had not asked payment from Cannon, nor taken any steps towards collecting the note or the fereelesing of the mortgage. Cannon's intention and object in the transaction with Bennett was not to pay of and extin-

guish the mortgage, but to purchase and hold it as a subsisting encumbrance on the land.

On June 18th 1822, by warranty deed of that date, Cannon conveyed all his interest in the land to one Semuel Gray, who entered into possession of the same. Gray occupied the premises until the 17th of January 1824, when he purchased of one Marvin an additional tract of land, containing about one acre, adjoining the land in question on the south and west; and on the 27th of April 1827, he conveyed the entire tract of land, as thus enlarged, by warranty deed of the date, to Eether Hubbell, of Norwalk, from whom the same has come through a large number of intermediate holders and possessors, and by numerous and an unbroken succession of deeds, mainly of warranty, and all duly recorded at or about the times of their respective dates, into the several possession and occupancy of the respondents; all of whom purchased and new hold their respective portions of the land under a bend fide claim of title. In so much of the land now occupied by the respendents, as was embraced in the original deed from David and Silas C. Lockwood to the petitioner, the respondents have no title. except such as they may derive through Cannon's deed to Gray, and the subsequent conveyances referred to, and such as they may derive from the occupancy of the premises, under the facts and circumstances found.

No payment of interest or principal, or any part thereof, has ever been made on the mortgage-debt, and there is no record or other evidence that the mortgage has ever been forcelessed. The question whether such forcelesses may be presumed from the lapse of time and the facts found, was submitted by the committee to the court.

After the deed from Cannon to Gray, of June 18th 1822, no reference has ever been made in any of the sub-equent deeds through which the respondents claim title, to the Bennett mortgage.

If the court should consider the Bennett mortgage as a still subsisting encumbrance on the land, then the committee found the amount due on the mortgage, computing interest to the 14th day of March 1874, to be the sum of \$950.00. The petitioner never requested a reconveyance of the legal title which passed by the mortgage, from any one, till the 6th day of October 1870, when she requested the respondents severally to release to her, by suita-

ble deeds, the legal title to the premises held by them respectively, which they severally refused to do.

The petitioner never asserted any claim of interest in the land until some time in the summer of 1869, after the death of her husband, nor were any of the respondents in any way informed of her claim of an interest in the premises until they received notice from her present attorneys, in the fall of 1870, a very short time before the petition was served.

The several respondents purchased their respective interests in the premises, for full consideration, in good faith, without any notice or suspicion of any adverse claim or interest therein on the part of the petitioner, or of any person or persons. The records of lands, however, in the town of Norwalk, disclosed the state of the title to the premises, and such notice as the law implies from this fact the respondents had, but no actual notice.

At the time of its purchase by Gray the land was very rough and barren, and poorly adapted to either agricultural or building purposes. Since that time the respondents, and various prior eccupants, in good faith, without notice of any claim or interest on the part of the petitioner in the premises, and in the belief on their part that they held perfect titles to the fee of the land, have at great expense made many improvements on the land by grading, draining and enriching the soil, and by setting out trees and shrubbery, and have also erected four dwelling-houses, with out-buildings and fences, which the respondents now occupy as their homesteads.

Upon these facts the case was reserved for the advice of this court.

L. Warner and Woodward, for the petitioner.

Smith (with whom was Beardsley), for respondents.

PARK, C. J.—The petitioner socks, by force of a mere technical right, to recover the possession of premises which have become of great value by reason of improvements made upon them, while it is evident that she abandoned all her interest in them nearly fifty years age. During all this period she has paid no interest on the note which the mortgage of her property was given to secure, nor has she looked after the property, or showed any interest in it. She has done nothing whatsoever indicating an intention ever to redoom the mertgage until recently, and it is manifest that her

desire to do so now is wholly ewing to the great advance of the property in value since the mortgage was given.

The claim of the petitioner is based upon the assumption that Cannon, the execution-creditor, went into the actual possession of the life-estate under and by virtue of the execution which was levied in his favor on the life-estate of Zalmon Hanford, the late husband of the petitioner, and that both he and the parties claiming under him continued to hold possession of the land, under the execution-levy, during the life of Zalmon Hanford. If this was so in fact, then the prayer of the petitioner abould be granted.

But if such was not the case, if Cannon never took possession of the land under the levy of his execution, but abandoned the interest he acquired by the levy, and some twe years subsequently went into the actual possession of the land under the mertgage interest which he had purchased, and claimed the entire property as his own under such purchase, and possessed it accordingly, and this possession was continued by the parties claiming the land under him, then the right of the petitioner has long since been extinguished.

Whether the one state of facts or the other existed in this case, is the question we have to determine.

It appears in the case that for nearly half a century the land in question has been held by absolute deeds; that during this period it has passed from granter to grantee through many conveyances. the granter in nearly every instance warranting the title in fee to his immediate successor; that the parties to these conveyances purchased the land in good faith, without notice of any claim whatever to it on the part of the petitioner; that the land was berron originally, and was poorly adapted to agriculture; that it has been divided into building lots, and has been graded, drained and earliched at great expense; that trees and shrubbery have been set out and other improvements made upon it; and that dwelling houses, out-buildings and fences, have been erected upon Thus it appears that, during this long period of time, parties in possession of the land have constantly exercised acts of absolute ewnership ever it, and unless some unsurmountable obstacle prevents . the running of the Statute of Limitations against the petitioner's claim, the case is one of the strongest character going to show that the statute has long since extinguished her interest.

The only difficulty in the case arises from the fact that Connec

levied his execution on the life-estate of Zalmon Hanford, and had it set off in part satisfaction of his debt, but whether he ever went into possession of the land under his levy, or claimed anything whatsoever from it, does not appear. It is found that he levied his execution, and there the finding leaves the matter. It is true that he was in possession of the land on the 18th day of June 1822, nearly two years after the levy of his execution, but it is also true that three months previous to that time he purchased an outstanding mortgage on the entire property, and received a quit-claim deed of the same, which conveyed to him the legal title to the property. This accounts for his possession at that time, while there is an indication that his possession was under his quit-claim deed, in the fact that on that day he gave an absolute deed of the entire property, and warranted the title to his grantee.

There is nothing going to show any previous possession under the levy of the execution except the presumption of law that a party is in possession of land which he owns unless it appears to be in the actual possession of a other. But this presumption has no reference to actual possession. It relates to constructive possession merely, and the rule was established for the benefit of the owner.

Nothing therefore appears in the case to show that Cannon ever in fact took or held possession of the land under his execution title, and the burden is on the petitioner to show that it was so held in order to avoid the running of the Statute of Limitations against her claims.

The life-estate was of little or no value at the time of the levy of the execution, and there could have been but little object in keeping it alive. The land was barren, and poorly adapted to agriculture, and it is manifest that the life-estate was not valuable for any other purposes. It required great expense to grade it for building purposes, and no man would think of incurring the expense necessarily attending the erection of buildings on the land when it was held by so precarious a tenure. The life-estate might terminate at any moment and valuable improvements consequently would be lost.

And furthermore, at the time that Cannon went into possession of the property under his mortgage interest, the entire property was not worth the amount of the mortgage, for he purchased it at less than the amount. The mortgage covered the entire property,

and was the first encumbrance on it, and it is unreasonable to suppose that the owner of the mortgage would have sold it for less than the amount of the mertgage-debt if the land was of greater value than the mortgage. It is therefore fair to presume that the life-estate in the hands of Cannon was of no value when he went into possession of the land under his mortgage interest. This accounts for his not going into possession of the property under the levy of his execution. It accounts too for his conveying the property by a deed of warranty, for he considered his mortgage-deed as equivalent to an absolute deed of the property, inasmuch as it represented its entire value.

We think therefore that the case shows that Cannon abandoned his levy for the benefit of the petitioner, and we may presume from the great length of time that the property has been held by parties in possession of the land, as absolute owners, that he quit-claimed to her all his interest acquired by the levy, and afterwards went into possession of the land under his mortgage-deed. Similar presumptions are made in cases of landlord and tenant, where the tenant and parties claiming the land under him have for many years occupied the land as absolute owners. The law presumes in such cases that the tenant surrendered the tenancy to his landlord together with the possession of the property, and subsequently austed him of the possession. It was so held by this court in the case of Camp v. Camp, 5 Conn. 291. In that case a tenant at will remained, after the death of the landlord, in the exclusive and uninterrupted possession of the land, claiming it as his own, for a period of fifty-seven years. It was held by the court, that although as a general rule a tenant is estopped to deny the title of his landlord, and although a person once a tenant will prime facie be deemed to continue in that character so long as he remains in possession of the land demised, yet it is competent for such person to show that the relation has been dissolved. And it was further held that, from the long period of time that the property had been adversely held, the jury were authorized to presume a restoration of the land to the heirs of the lessor, and afterwards an ouster of them, thereby dissolving the relation which at first subsisted. The analogy of this case to the present one is apparent. There can be but little difference in principle, so far as the present question is concerned, between a tenant for life and a tenant for years. Acts of absolute ownership are as much inconsistent with the one as with the other, and if in the one case, where such acts have been long continued, the jury may be warranted in finding that the property had been surrendered to the landlord, and an ouster afterward committed, so may the presumption we have stated be warranted in the case at bar.

The Supreme Court of the United States, in the case of Willison v. Walkins, 8 Pct. 48, says: "It is an undoubted principle of law fully recognised by this court, that a tenant cannot dispute the title of his landlord, by setting up a title either in himself or in a third person, during the existence of the lease or tenancy. * * The same principle applies to mortgagor and mortgagee, trustee and cestui que trust, and generally to all cases where one man obtains possession of real estate belonging to another by a recognition of his title. On all these subjects the law is too well settled to require illustration or reasoning or to admit of a doubt. But we do not think that in any of these relations it has been adopted to the extent contended for in this case, which presents a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession for such length of time that the act of limitation has run out four times before he has done any act to assert his right to the land. Had there been a formal lease for a term not then expired, the lessee forfeited it by this act of hostility; had it been a lease at will from year to year, he was entitled to no notice to quit before an ejectment. The landlord's action would be as against a trespessor, as much so as if no relation had ever existed between them." This case is a strong one on the point we are considering. The court say: "Had there been a formal lease for a term not then expired, the lessee forfeited it by this act of hostility;" that is, the assumption of absolute ownership of the preparty would forfeit a lease executed with all the forms of law and cause the premises to revert to the landlord, who might immediately treat his former tenant as a trespassor.

This case goes farther, perhaps, than our own courts would be prepared to go. We should, probably, have applied to the case the doctrine of Camp v. Camp, and have held that the disclaimer, taken in connection with the adverse possession of the premises, was sufficient to warrant the jury in finding a surrender of the tenancy to the landlord and an ouster afterwards. See also Blight's Lessee v. Rochester, 7 Wheat. 585; Adams on Ejectment 118: Bull. N. P. 96.

We think therefore that the life-estate of Zalmon Hanford terminated in the manner we have supposed when Cannon went into possession of the land under his mortgage-deed; and that consequently there was nothing afterwards to prevent the running of the Statute of Limitations against the petitioner's claim, for the law is well settled that a mortgages may hold land adversely so that his possession will eventually ripen into ru sheolute title: Bunce v. Welcott, 2 Conn. 27; Jarvie v. Weedruff, 22 Conn. 548.

The conclusion we have come to in the case is clearly equitable. The petitioner had ample notice from the acts of the parties helding the land, that they were not helding it under the levy of the execution, but in their own right as absolute ewners, and for nearly fifty years she appears to have acquiseced in the right and to have abandoned her equity of redemption.

In coming to the conclusion at which we have arrived, we have not overlooked the fact that the petitioner, until the year 1869, was a married woman. If it were an ordinary case of adverse possession of her land, her coverture would save her from the application of the Statute of Limitations. But we think that a wife who joins with her husband in a mortgage of her land is not protected by her coverture from the ordinary effect of the adverse possession of the mortgagee. This adverse possession is not strictly against the legal title of the mortgagors; for, as between himself and them, he has the legal title, and they have as against him no right of entry to be barred; but the adverse possession is against the equitable right of the mortgagors to redeem, so that a court of equity in holding their right to redoem to be barred by the lapse of time, is merely applying an equitable limitation, in analogy to the Statute of Limitations at law, and we regard it as equitable that the wife, who has voluntarily placed herself in the position of a mortgagor, should be held to have accepted all the usual conditions and incidents of the position, and that her right to redoom is lost in equity when there has been such a lapse of time as would in equity bar the right of an ordinary mertgager to redeem. We think, too, that, in view of the tendency of our legislation as well as of the decisions of the courts throughout the country, to recognice the separate rights of married women with regard to their proporty, and their power to control the same, our courts should lean towards an enlargement of their responsibility and duty with regard to their property, and a curtailment of those exemptions and privileges that were given to married women as an offset for their want of power.

We advise the Superior Court to dismiss the petition.

In this opinion CARPENTER and PHELPS, JJ., concurred. Fos-

The question, whether a party has title to a certain estate, as an entire question, is one of fact, although its solution may depend on law, and if an appellant would have the case reviewed, he must have the findings such that the matters of fact, which raise the question of law involved, shall be fully settled: Fornham v. Hotchkies, 1 Abb. (N. Y.) App. Dec. 98. But the petitioner is not chilged to present proof of facts which are presumed by law: Dugas v. Ediletts, 5 La. Ann. 560; Devenport v. Meson, 5 Mass. 65; Boolem v. State, 17 Ala-481. And it is a presumption of law that the owner is in possession of his own, and it is also a presumption of low, that the levy of attachment was, after being returned by the officer, duly recorded by the clerk, for which precise condition we are unable to find any precodent; still if the record by the clerk which it was his duty to make, may be presumed to have been made, then Cannon, the party under whom the respondents claim title, was the owner of a lifeinterest in the premises, and is presumed by law to have been in pessention two years before he purchased a quit-claim dood of the potitioner's mortgages. And If Cannon was in possession of the promises as owner of a life-estate therein at the time he purchased a quit-stalm from the mortgages, it is necessary to show some not of foreclosure other than the more purchase of the quit-claim, in order to render the possession adverse to the patitioner's right in remainder. The registration of a deed is not notice of its contents to any except subsequent perchasers, unless made so by stat-

nte: Baker v. Washington, 5 Stew. (Ala.) 142; Techem v. Young, 1 Port. (Ala.) 298, and it is not so constituted by statute in Connecticut. And this is the only act of Cannon which can be considered as approaching to notice of adverse possession.

But If thin hypothesis, which depends for its support upon the presumption that the execution was recorded by the clerk of the court, cannot be maintained, there still remains a more difficult question to answer, namely the petitioner's coverture until 1969. In Connecticut ft has been held that title by adverse possession cannot be acquired against a married woman during coverture: Gage v. Smith, 27 Cong. 76; Watson v. Watsen, 10 Id. 77. And it has been very generally held, in nearly all the states of the union, that the Statute of Limitations does not begin to run against a married woman while she is covert: Brdy v. Clopton, 6 Ala. 309; Michau v. Wgott, 21 Id. 818; Wilson v. Wilson, 36 Cal. 447; Futheres v. Fletcher, 31 Miss. 268; Fours v. Shiley, St Miss. 301; Coldwell v. Dlack, & Ired. (N. C.) L. 468; McLoan v. Jackson, 12 Id. 149; McLeen v. Moore, 6 Jones (N. C.) L. 520; Jones v. Rosse, 6 Rich. (8. C) 129.

And how the wife joining with her husband in a mortgage-dood can make any difference beyond giving the mortgages a right to foresions, we are unable to see. That the mortgages has the right of foresioners is indisputable, and a decree against the husband and wife would have berred both: 6 B. Mon. (Kg.) 876. And this we think to all

that the wife can have been hald to have consented to in joining with her husband in the mortgage-lood. The applicability of the Rentate of Limitations depends on the capacity or non-capacity of the defendant to sue, and not on the existence or non-existence in her of a right of disposal: Makhauser v. Langloph, 20 Mo. 484. But in Connecticut the only previolen in regard to the rights of married women to sue or to be sued in their own names relates to the contingency of their exerciting on a separate business under their own names; and in actions of aject-

poors to a person after the removal of disability, in which to bring suit, and this provision may be said to apply equally to a bill in equity to redom ; truce equity nots upon the Statutes of Limitations only from analogy and in the case of a mortgage takes the analogy from the ordinary limitation to rights of entry and actions of ejectment: Story's Equity Jurisprudence, §§ 64 a, 1006 a, and in this instance the patitioner seems to have brought her bill within the five years.

Lan.

Bupreme Court of Illinois.

PULLMAN PALACE CAR CO. R. SMITH.

A palace or alcoping-ear is not an inn, nor is the company owning it subject to the responsibilities as to traveller's baggage of an innkeeper at common law.

A traveller, who was being transported by a reitroad company, to whom he had paid a fare, took a borth in a sleeping-car attached to the train, but belonging to a different company, for which he paid an extra sum to the sleeping-car company. While asleep he was rebbed of a large sum of money he carried in his pecket. Bold, that the sleeping-car company was not liable, either as an innkeeper or as a comman carrier.

APPEAL from Cook county.

This was an action brought by Chester M. Smith, appellee, against the Pullman Palace Car Company, appellant, for the recovery of \$1180, claimed to have been lest from a Pullman eleopingear, under the following circumstances:

Appelles, starting from his home in Occasionewes, Wis., for a point in Misseuri, south-west of St. Louis, for the purpose of buying horses and mules, purchased a ticket through to St. Louis, sie The Milwaukee and St. Paul Railway to Chicago, thence to St. Louis, ever the Alten and St. Louis Railway. He arrived at Chicago about eight e'clock in the evening and bought from appellent a sleeping-car ticket from Chicago to Rast St. Louis, for which he paid the sum of two dellars, and took a berth in the Pullman car, which left Chicago for St. Louis, at nine e'clock v. M. His menoy, \$1180, was in an incide vest pocket, and when he restred for the night, the vest was placed under his pillow; in

the morning he found the vest as he left it, but the money was gone.

On behalf of the Pullman Palace Car Company, it appeared, that they have no place to store valuables, and that their agents are instructed to receive no parcels, valuables or money, and receive no pay for baggage, or valuables of any kind, but only to take pay for the occupancy of the berths; and that they do not receive packages, valuables or money, from passengers on the car, to take charge of; upon the back of their checks, which are given when the tickets are taken up, is printed the following: "Wearing apparel or baggage placed in the car, will be entirely at the owner's risk." They receive into their cars only those who have a firstclass passage ticket, or a proper pass from the railroad company; passengers receive their berths for a particular trip, and for a particular berth and car, paying in advance. The company has no interest in the fare paid by the passenger to the railroad company for transportation, and the railroad company has no interest in the prices paid the Pullman Palace Car Company for berths; the latter receive pay for alceping accommodations, none whatever for transportation.

The court below gave the following instruction to the jury:

"If the jury believe from the evidence, that the plaintiff, while sleeping in the defendant's car, on the trip from Chicago to Alton, was robbed of a sum of money which he then had with him, then the verdict should be in his favor for the sum of which he was so robbed, unless the same was greater than would be an ordinary and reasonable sum for a traveller to carry with him for travelling expenses only, upon such a journey as the plaintiff was then upon, and his return home; in which case he should only recover such ordinary and reasonable sum, to which the jury may, if they think proper, add interest at six per cent. for fourteen months."

The jury returned a verdict for the plaintiff for \$277, upon which judgment was rendered, to reverse which the Pullman Palace Car Company bring this appeal.

The opinion of the court was delivered by

SEELDON, J.—The instruction which the court gave to the jury, made the company responsible as insurer for the safety of the money, imposing upon it the severe liability of an innkeeper or common carrier; and it is the position which appelles's councel

take, that the relation between the parties in this case was that of innkeeper and guest, and that the liability of the company is that of an innkeeper.

In order to ascertain whether the extraordinary responsibility elaimed here exists, it becomes important to inquire into the nature of inns and guests, where this liability was imposed by the common law, and see whether the description properly applies here. Kent, in defining an inn, says: "It must be a house, kept open publicly, for the lodging and entertainment of travellers in general, for a reasonable compensation. If a person lets lodgings only, and upon a provious contract, with every person who comes, and does not afford entertainment for the public at large indiscriminately, it is not a common inn:" I Kent Com. 595. This is substantially the same definition as is given in all the books upon the subject.

"But the keeper of a more coffee-house, or private boarding or lodging-house, is not an innkeoper in the sense of the law." 2 Kent Com. 596; Dansey v. Richardson, 8 Ellis & Bl. 144; Holder v. Soulby, 8 C. B. N. S. 254; Kisten v. Hildsbrand, 9 B. Monroe 72. It must be a common inn, that is, an inn kept for travellers generally, and not merely for a short season of the year, and for select persons who are lodgers. Story on Bailm., § 475, and cases cited in note. The duty of innkeepers extends chiefly to the entertaining and harboring of travellers, finding them victuals and lodgings, and securing the goods and effects of their guests; and, therefore, if one who keeps a common inn, refuses either to receive a traveller as a guest into his house, or to find him victuals or lodgings, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury, in an action on the case, at the suit of the party grieved, but also may be indicted and fined at the suit of the King. 3 Bec. Ab., Inns and Innkeepers, C. The custody of the goods of his guest is part and parcel of the innkeeper's contract to feed, lodge and accommodate the guest, for a suitable reward: 2 Kent's Com. *5*92.

From the authorities already cited, it is manifest that this Pullman Palace Car falls quite short of filling the character of a common inn, and the Pullman Palace Car Company that of an innkeeper.

It does not, like the innkeeper, undertake to accommedate the

boarding public, indiscriminately, with lodging and entertainment. It only undertakes to accommodate a certain class, these who have already paid their fare, and are provided with a first-class ticket entitling them to a ride to a particular place.

It does not undertake to furnish victuals and lodging, but lodging alone, as we understand. There is a dining ear attached to the train, as shown, but not owned by the Pullman Company, nor run by them. It belongs to another company—the Chicago and Alton Dining Car Association. Appellant, as we understand, furnishes no accommodation whatever, save the use of the berth and bed, and a place and conveniences for toilet purposes. We would not have it implied, however, that even were these eating accommodations furnished by appellant, it would vary our decision, but the not furnishing entertainment is a lack of one of the features of an inn.

The innkeeper is obliged to receive and care for all the goods and property of the traveller, which he may choose to take with him upon the journey; appellant does not receive pay for, nor undertake to care for any property or goods whatever, and noteriously refused to do so. The custody of the goods of the traveller is not, as in the case of the innkeeper, accessory to the principal contract to feed, lodge and accommodate the guest for a suitable reward, because no such contract is made.

The same necessity does not exist here as in the case of a common inn. At the time when this custom of an innkeeper's liability had origin, wherever the end of the day's journey of the wayfaring traveller brought him, there he was obliged to stop for the night, and intrust his goods and baggage into the custody of the innkeeper. But here the traveller was not compelled to accept the additional comfort of a sleeping-car; he might have remained in the ordinary ear, and there were easy methods within his reach by which both money and baggage could be safely transported. On the train which bore him, were a baggage and an express ear, and there was no necessity of imposing this duty and liability on appellant.

It cannot be supposed that any such measure of duty or liability attached to appellant, as is declared in the quotation cited from Bacon's Abridgment, to belong to an innkeeper. The accommodation furnished appelles was in accordance with an express contract, entered into when he bought his borth ticket at Chicago,

which was for the use of a specified seach from Chicago to St. Louis, and appellant did not render a service made mandatory by law, as in the case of an innkeeper.

But if it should be deemed, that on principle merely, this company would be required to take as much care of the goods of a lodger, as an innkeeper of these of a guest, the same may be said with reference to the keeper of a boarding-bouse, or of a lodgingbouse. In Dansey v. Richardson, supra, where the inukeeper's liability was refused to be extended to a boarding-house keeper, it was said by COLERIDGE, J.: "The liability of the innkeeper, as indeed other incidents to his position, do not, however, stand on more reason, but on custom, growing out of a state of society no longer existing." In Holder v. Soulby, supra, where it was held the law imposed no duty upon a lodging-house keeper, to take due care of the goods of a lodger, Calye's ease, 8 Co. Rep. 32, was designated as fone juris, upon this subject, where it was expressly resolved, that though an innkeeper is responsible for the eafety of the goods of a guest, a lodging-house keeper is not. And in Parker v. Plint, 12 Mod. 265: "If," says Lord HoLT, "one come to an ian, and make a previous contract for ladging for a set time, and do not eat or drink there, he is no guest, but a lodger, and as such, is not under the innkesper's protection; but if he cat or drink there, it is otherwise; or if he pay for his diet there, though he do not take it there."

The peculiar liability of the innkeeper is one of great rigor, and should not be extended beyond its proper limits. We are satisfied that there is no precedent, or principle, for the imposition of such a liability upon appellant.

Appellant is not liable as a carrier. It made no contract to carry. Appellae was being carried by the railroad company, and if appellant was a carrier, it would not be liable for the less in this case, because the money was not delivered into the possession or custody of appellant, which is essential to its liability as carrier: Towner v. The Utica & Schenestady Railroad Company, 7 Hill 47. In vol. 2, Redf. Am. Railroad Cases 188, it is eaid: "But it has never been claimed that the passenger carrier is responsible for the sets of pickpockets at their stations, or upon steamboats and railway carriages."

It would be unreasonable to make the company responsible for the loss of money which was never intrusted to its sustedy at all, of which it had no information, and which the owner had concealed upon his own person. The exposure to the hazard of liability for losses by collusion for pretended claims of less where there would be no means of disproof, would make the responsibility claimed a fearful one. Appellee assumed the exclusive custody of his money, adopted his own measures for its safe-keeping, by himself, and, we think, his must be the responsibility of its loss.

We hold the instruction to be erroneous, and the judgment of the court below is reversed, and the cause remanded.

It seems clear that the exceedingly severe liabilities and duties of an innheeper at common law cannot be imposed upon the awners of palace cars attached to railway trains in this country. There are, it is true, some points of resemblance between an innkeeper and an operator or owner of a sleepingcar, or between a guest at an inn and the occupant of a berth in a sleepingear; and these resemblances might furmish reasons why some limited liability should be placed upon these companies by the courts, or if that is not possible, In the absence of any general principle of law which can be extended to meet the the case, then by the legislature. Such, for instance, as to hold the companies responsible for any theft or wrongful act of their servants, though done out of the line of the servants' regular employment.

The points of dissimilarity between the two classes of cases are fully and fercibly set forth in the opinion of the court in the principal case, and very properly formed the basis of their decision.

The courts both in England and America have uniformly and positively refused to extend the rule of the liability of an iunkeeper beyond the narrow limits which conduct it at common law. The Roman law placed a lighter berden upon the keeper of an iun, holding him liable for the lose of the goods of a guest only in case the goods were delivered to the iunkeeper, and put under his encody,

except in cases where it was proved that the loss was caused by other guests or by the servants of the inn: Pothier, Traité de Dépôt, n. 79; Story on Bailment, § 468.

The legislatures of some of the states have shown the same tendency as the courts in restricting the liabilities of innkeepers, and have brought the law in this respect nearer to the rule of the Roman law. Thus, in Ponnsylvania, the Act of 7th May 1855, exacts that whenever an innkeeper provides a secure safe for the safe-keeping of valuables, and gives proper notice thereof, he shall be liable to his guests only for the loss of such amounts of money, and such articles of baggage, &c., as it is usual and prudent for a man to retain in his room or about his person. Similar statutes have been passed in New York and some other states.

It may be of interest to cite some cases, in addition to those referred to in the principal case, to show more fully to what kind of cases the rule of an iankeoper's liability has been extended.

The reason of the rule has been stated by Sir William Jones as follows:

"Rigorous as the law in relation to innkeepers may seem, and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield; for travellers who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of inubolders, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with ruffians and piliferers, while the injured guest could seldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them: 1° Jones on Bailments 93, 96.

In Manning v. Wells, 9 Humph. 748, the court said: "A passenger or way-faring man may be an entire stranger. He must put up and ledge at the inn to which his day's journey may bring him. It is therefore important that he should be protected by the most stringent rules of law, enforcing the liability of an innkesper." See also Berkshire Weellan Co. v. Practor, 7 Cush. 417.

In Cromwell v. Stephens, 2 Daly 15, the court, in a very learned opinion by DALY, P. J., said: "A more ledging-boase, in which no provision is made for supplying ledgers with their meals, wants one of the essential requisites of an inn." And further, that an inn is a house where all who conduct themselves properly, &c., are received, and while there are supplied at reasonable charge with ledging, meals and services.

In Carpenter v. Taylora, 1 Hilton 198, the court held that a restaurant could not be considered an inn, and said that "on the contrary, as the customs of society change and the modes of living are altered, the law as established under different circumstances must yield and be accommodated to such changes." In another case in the same state, a distinction was drawn between inn-keepers and bearding-house keepers t Wintermate v. Clarke, 5 Sandé. 248.

In Bonner v. Wellburn, 7 Ga. 296, the court want so far as to hold that a public hotel at a watering-place, possessing a medicinal spring and open during the summer and fall for visitors in search of health or pleasure, was of the nature of a boarding-house and not of a tavern or house of entertainment. So a person living at Epsem and ledging strangers for drinking the waters in the season, was held not to be an innkeeper against whom an action would lie for refusing to entertain a guest : 5 Bac. Abr. 228.

In Lyon v. Smith, 1 Morrie 184, the court were of opinion that a person who does not hold himself out as an inn-keeper, but outertains travellers occasionally for pay, in not subject to the liabilities of an innkeeper.

The result of all the cases seems to be, as above stated, that the rule will not be carried beyond the marrow Husto within which it was originally confood, not even to cover the case of a boardinghouse keeper. It would evidently be against all the authorities on the subjest to bring the appollants in the principal case within this rule. There seems to be no other ground than the one above discussed, upon which the appelles in this case could resover. In the absence of delivery of the money to the appellant's agent or servant, there could, as the court in the principal case held, he no recovery for the less. See Story Balles., § \$32, and cases in u. 4.

With regard to the notice which is scens to here been assumed that the appelles had received, that the company appellants would not be responsible for beggage, &c., it is doubtful whether this would of itself, even though brought home to the occupant of a borth, be exough to remove a Hability otherwise resting upon the company. It has been hold in the case of innkespore that such notice did not affect the duties and liabilities of the innhospers : Jahnees v. Richorden, 17 Ille. 808: Profile v. Hall, 14 La. Ann. 864. Though an informer to the contrary may be drawn from Britishire, fra, On v. Freezer, 7 Cash. J. R.

Supreme Court of the United States.

MATIONAL BANK OF COMMERCE 6. MERCHANTS MATIONAL BANK.

Where the holder of a time-draft, with accompanying bills of lading, sends them to an agent with no special instructions to hold the bills of lading, the agent is authorized to surrender the bills to the drawee on the latter's acceptance of the

It does not make any difference that the drafts are sent to the agent " for collection." That instruction merely rebuts the inference of the agent's ownership of

Bills of lading, though transferable by endorsement, are only quasi negetiable; and the endersee does not negate the right to change the agreement between the shipper and his vendee.

In error to the Circuit Court of the United States for the District of Massachusetts.

The opinion of the court was delivered by

STRONG, J.—The fundamental question in this case is whether a bill of lading of merchandise deliverable to order, when attached to a time-draft, and forwarded with the draft to an agent for collection, without any special instructions, may be surrendered to the drawes on his acceptance of the draft, or whother the agent's duty is to hold the bill of lading after the acceptance, for the payment. It is true there are other questions growing out of portions of the evidence, as well as one of the findings of the jury, but they are questions of secondary importance. The bills of exchange were drawn by cotton brokers residing in Memphis, Tennessee, on Green & Travis, merchants residing in Boston. They were drawn on account of cotton shipped by the brokers to Boston, invoices of which were sent to Green & Travis, and bills of lading were taken by the shippers, marked in case of two of the shipments "to" order," and in case of the third shipment marked "for Green & Travis, Boston, Mass." There was an agreement between the shippers and the drawers that the bill of lading should be surrendered en acceptance of the bilis of exchange, but the existence of this agreement was not known by the Bank of Memphis when that bank discounted the drafts and took with them the bills of lading endorsed by the shippers. We do not propose to inquire new whether the agreement, under these circumstances, ought to here any effect upon the decision of the case. Conceding that bills of lading are negotiable, and that their endorsement and delivery pass the title of the shippers to the property specified in

them, and, therefore, that the plaintiffs when they discounted the drafts and took the endorsed railroad receipts or bills of lading, became the owners of the cotton; it is still true they sent the bills with the drafts to their correspondents in New York, the Metrepolitan Bank, with no instructions to hold them after acceptance. And the Metropolitan Bank transmitted them to the defendants in Boston, with no other instruction than that the bills were sent "for collection." What, then, was the duty of the defendants? Obviously it was first to obtain the acceptance of the 'sile of exchange. But Green & Travis were not bound to accept, even though they had ordered the cotton, unless the bills of lading were delivered to them contemporancously with their acceptance. Their agreement with their vendors, the shippers, secured them against such an obligation. Moreover, independent of this agreement, the drafts upon their face showed that they had been drawn upon the cotton covered by the bills of lading. Both the plaintiffs and their agenta, the defendants, were thus informed that the bills were not drawn upon any funds of the drawers in the bands of Green & Travis, and that they were expected to be paid out of the proceeds of the cotton. But how could they be paid out of the proceeds of the cotton if the bills of lading were withheld? Withholding them, therefore, would defeat alike the expectation and the intent of the drawers of the bills. Hence, were there nothing more, it would seem that a drawer's agent to collect a time-bill, without further instructions, would not be justified in refusing to surrender the property against which the bill was drawn, after its acceptance, and thus disable the acceptor from making payment out of the property designated for that purpose.

But it seems to be a natural inference, indeed a necessary implication, from a time-draft accompanied by a bill of lading endorsed in blank, that the merchandise (which in this case was cotton) specified in the bill was sold on credit, to be paid for by the accepted draft, or that the draft is a demand for an advance on the shipment, or that the transaction is a consignment to be sold by the drawes on account of the shipper. It is difficult to conceive of any other meaning the instruments can have. If so, in the absence of any express arrangement to the contrary, the acceptor, if a purchaser, is clearly entitled to the possession of the goods on his accepting the bill and thus giving the vender a completed contract for payment. This would not be doubted if, in-

stead of an acceptance, he had given a promissory note for the goods, payable at the expiration of the stipulated credit. In such a case it is clear the vendor could not retain possession of the subject of the sale after receiving the note for the price. The idea of a sale on credit is that the vendee is to have the thing sold, on his assumption to pay, and before actual payment. The consideration of the sale is the note. But an acceptor of a bill of exchange stands in the same position as the maker of a promissory note. If he has purchased on credit and is denied possession until he shall make payment, the transaction ceases to be what it was intended, and is converted into a cash sale. Everybody understands that a sale on credit entitles the purchaser to immediate possession of the property sold, unless there be a special agreement that it may be retained by the vendor, and such is the well-recognised doctrine of the law. The reason for this is that very often, and with merchants generally, the thing purchased is needed to provide means for the deferred payment of the price. Hence, it is justly inferred that the thing is intended to pass at once within the control of the purchaser. It is admitted that a different arrangement may be stipulated for. Even in a credit sale it may be agreed by the parties that the vendor shall retain the subject until the expiration of the credit, as a security for the payment of the sum stipulated. But if so, the agreement is special, something superadded to an ordinary contract of sale on credit, the existence of which is not to be presumed. Therefore, in a case where the drawing of a timedraft against a consignment raises the implication that the goods consigned have been sold on credit, the agent to whom the draft to be accepted and the bill of lading to be delivered have been entrusted cannot reasonably be required to know, without instruction, that the transaction is not what it purports to be. He has no right to assume and act on the assumption that the vendee's term of credit must expire before he can have the goods, and that he is bound to accept the draft, thus making himself absolutely responsible for the sum named therein, and relying upon the vendor's engagement to deliver at a feture time. This would be treating a sale on credit as a mere executory contract to sell at a subsequent date.

And, if the inference to be drawn from a time-draft accompanied by a bill of lading is not that it evidences a credit sale, but a request for advances on the credit of the consignment, the consequence is the same. Perhaps it is even more apparent. It plainly is that the acceptance is not asked on the credit of the drawer of the draft, but on the faith of the consignment. The drawer is not asked to accept on the mere assurance that the drawer will at a future day deliver the goods to reimburse the advances. He is asked to accept in reliance on a security in hand. To refuse to him that security is to deny him the basis of his requested acceptance. It is remitting him to the personal credit of the drawer alone. An agent for collection having the draft and attached bill of lading cannot be permitted, by declining to surrender the bill of lading on the acceptance of the bill, to disappoint the obvious intentions of the parties, and deny to the acceptor a substantial right which by his contrast is assured to him. The same remarks are applicable to the case of an implication that the merchandise was shipped to be sold on account of the shipper.

Nor can it make any difference that the draft with the bill of lading has been sent to an agent (as in this case) "for collection." That instruction means simply to rebut the inference from the endorsement that the agent is the owner of the draft. It indicates an agency: Sweeney v. Ecoter, 1 Wall. 166. It.does not conflict with the plain inference from the draft and accompanying bill of lading that the former was a request for a promise to pay at a future time for goods sold on credit, or a request to make advances . on the faith of the described consignment, or a request to sell on account of the shipper. By such a transmission to the agent be is instructed to collect the money mentioned in the drafts, not to collect the bill of lading. And the first step in the collection is procuring acceptance of the draft. The agent is, therefore, anthorized to do all which is necessary to obtaining such acceptance. If the drawee is not bound to accept without the surrender to him of the consigned property or of the bill of lading, it is the duty of the agent to make that surrender, and if he fails to perform this duty, and in consequence thereof acceptance be refused, the drawer and endorser of the draft are discharged: Meson v. Hunt, 1 Dung. 297.

The opinions we have suggested are supported by other very rational considerations. In the absence of special agreement, what is the consideration for acceptance of a time-draft drawn against merchandise consigned? Is it the merchandise, or is it the promise of the consignor to deliver? If the latter, the con-

signor may be wholly irresponsible. If the bill of lading be to his order, he may, after acceptance of the draft, endorse it to a stranger, and thus wholly withdraw the goods from any possibility of their ever coming to the hands of the acceptor. Is, then, the acceptance a mere purchase of the promise of the drawer? If so, why are the goods forwarded before the time designated for payment? They are as much after shipment under the control of the drawer as they were before. Why incur the expense of storage and of insurance? And if the draft with the goods or with the bill of lading be sent to a bank for collection, as in the case before us, can it be incumbent upon the bank to take and maintain custody of the property sent during the interval between the acceptance and the time fixed for payment? (The shipments in this case were hundreds of bales of cotton.) Meanwhile, though it be a twelvemonth, and no matter what the fluctuations in the market value of the goods may be, are the goods to be withheld from sale or use? Is the drawee to run the risk of falling prices with ne ability to sell till the draft is due? If the consignment be of perishable articles, such as peaches, fish, butter, eggs, &c., are they to remain in a warehouse until the term of credit shall expire? And who is to pay the watchouse charges? Certainly not the drawees. If they are to be paid by the vendor, or one who has succeeded to the place of the vendor by endorsement of the draft and bill of lading, he fails to obtain the price for which the goods were sold.

That the holder of a bill of lading, who has become such by endorsement, and by discounting the draft drawn against the consigned property, succeeds to the situation of the shipper, is not to be doubted. He has the same right to demand acceptance of the accompanying bill, and no more. If the shipper cannot require acceptance of the draft without surrendering the bill of lading, neither can the bolder. Bills of lading, though transferable by endersement, are only quasi negotiable: 1 Parsons on Shipping 192; Blanchard v. Page, 8 Gray 297 a. The endorser does not acquire a right to change the agreement between the shipper and his vendee. He cannot impose obligations or deny advantages to the drawee of the bill of exchange drawn against the shipment which were not in the power of the drawer and consignor. But were this not so, in the case we have now in hand, the agents for sellection of the drafts were not informed, either by the drafts

themselves or by any instructions they received, or in any other way, that the ownership of the drafts and bills of lading was not still in the consignors of the cotton. On the contrary, as the drafts were sent "for collection," they might well conclude that the collection was to be made for the drawers of the bills. We do not, therefore, perceive any force in the argument preced upon us that the Bank of Memphis was the purchaser of the drafts drawn upon Green & Travis, and the holder of the bills of lading by endorsement of the shippers.

It is urged that the bills of lading were contracts collateral to the bills of exchange which the bank discounted, and that when transferred they became a security for the principal obligation. namely, the contract evidenced by the bills of exchange; for the whole contract, and not a part of it, and that the whole contract required not only the acceptance, but the payment of the bills. The argument assumes the very thing to be proved, to wit: that the transfer of the bills of lading were made to secure the payment of the drafts. The opposite of this, as we have seen, is to be inforred from the bills of lading and the time-drafts drawn against the consignment, unexplained by express stipulations. The bank, when discounting the drafts, was bound to know that the drawers on their acceptance were entitled to the cotton, and, of course, to the evidences of title to it. If so, they knew that the bills of lading could not be a security for the ultimate payment of the drufts. Payment of the drafts by the drawers was no part of the contract when the discounts were made. The bills of exchange were then incomplete. They needed accomptance. They were discounted in the expectation that they would be accepted, and that thus the bank would obtain additional promissors. The whole purpose of the transfers of the bills of lading to the bank may, therefore, well have been satisfied when the additional names were secured by acceptance, and when the drafts thereby became completed bills of exchange. We bave already seen that whether the drafts and accompanying bills of lading evidenced sales on credit, or requests for advancements on the cotton consigned, or bailments to be sold on the consigner's account, the drawers were entitled to the possession of the cotton before they could be required to accept, and that if they had declined to accept because possession was denied to them concurrently with their acceptance, the effect would have been to discharge the drawers and endorsers of the drafts. The demand of

acceptance, coupled with a claim to retain the bills of lading, would have been an insufficient demand. Surely, the purpose of putting the bills of lading into the hands of the bank was to secure the completion of the drafts by obtaining additional names upon them, and not to discharge the drawers and endorsers, leaving the bank only a resort to the cotton pledged.

It is said that if the plaintiffs were not entitled to retain the bills of lading as a security for the payment of the drafts after their acceptance, their only security for payment was the undertaking of the drawers, who were without means, and the promise of the acceptors, of whose standing and credit they knew nothing. This may be true, though they did know that the acceptors had previously promptly met their acceptances, which were numerous and large in amount. But if they did not choose to rely solely on the responsibility of the acceptors and drawers, they had it in their power to instruct their agents not to deliver the cotton until the drafts were paid. Such instructions are not infrequently given in case of time-drafts against consignments, and the fact that they are given tends to show that in the commercial community it is understood, without them, agents for collection would be obliged to give over the bills of lading on acceptance of the draft. Such instructions would be wholly unnecessary, if it is the duty of such agents to hold the bills of lading as securities for the ultimate payment

Thus far we have considered the question without reference to any other authority than that of reason. In addition to this, we think the decisions of the courts and the language of many eminent judges accord with the opinions we avow. In the case of Lanfear v. Blossem, 1 La. Ann. Rep. 148, the very point was decided, after an elaborate argument both by the counsel and by the court. It was held that "where a bill of exchange drawn on a shipment, and payable a certain number of days after sight, is sold, with the bill of lading appended to it, the holder of the bill of exchange . cannot, in the absence of proof of any local usage to the contrary, er of the imminent incolvency of the drawer, require the latter to accept the bill of exchange, except on the delivery of the bill of lading; and when, in consequence of the refusal of the holder to deliver the bill of lading, acceptance is refused and the bill protested, the protest will be considered as made without cause, the drawee not having been in default, and the drawer will be dis-

This decision is not to be distinguished in its essential features from the opinions we have expressed. A judgment in the same case to the same effect was given in the Commercial Court of New Orleans by Judge Warrs, who supported it by a very convincing opinion: 14 Hunt's Merchants' Magazine 264. These decisions were made in 1845 and 1846. In other courts, also, the question has arisen, what is the duty of a collecting bank to which time-drafts, with bills of lading attached, have been sent for collection? and the decisions have been that the agent is bound to deliver the bills of lading to the acceptor on his acceptance. the case The Wisconsin Marine & Fire Insurance Company v. The Bank of British North America, 21 Upper Canada Queen's Bench Reps. 284, decided in 1861, where it appeared that the plaintiff, a bank at Milwaukee, Wisconsin, had sent to the defendants, a bank at Toronto, for collection, a bill drawn by A., at Milwaukee, en B. at Terente, payable forty-five days after date, together with a bill of lading, endorsed by A., for certain wheat sent from Milwaukee to Toronto, it was held that, in the absence of any instructions to the contrary, the defendants were not bound to retain the bill of lading until payment of the draft by B., but were right in giving it up to him on obtaining his acceptance. This case was reviewed, in 1868, in the Court of Error and Appeals, and the judgment affirmed: 2 Upper Canada Error and Appeal, Reps. 282. See also Goodenough v. The City Bank, 10 Upper Canada Com. Pleas 51; Clark v. The Bank of Montreal, 18 Grant's Ch. 211.

There are also many expressions of opinion by the most respectable courts, which, though not judgments, and, therefore, not authorities, are of weight in determining what are the implications of such a state of facts as this case exhibits. In Shepherd v. Harrison, Law Rep. 4 Q. B. 498, Lord Cockburk said: "The authorities are equally good to show, when the consigner sends the bill of lading to an agent in this country to be by him handed ever to the consignee, and accompanies that with bills of exchange to be accepted by the consignee," that that "indicates an intention that the handing over of the bill of lading and the acceptance of the bill or bills of exchange, should be consument parts of one and the same transaction." The case subsequently went to the House of Lorde (5 H. L. 183), where Lord Caines said: "If they (the drawess), accept the earge and bill of lading, and accept

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the bill of exchange drawn against the cargo, the object of those who shipped the goods is obtained. They have got the bill of exchange in return for the cargo; they discount, or use it as they think proper, and they are virtually paid for the goods." Coventry v. Gladstone, Law Rep. 4 Eq. 498, it was declared by the Vice-Chancellor that "the parties shipping the goods from Calcutta, in the absence of any stipulation to the contrary, did give their agents in England full authority, if they thought fit, to pass ever the bill of lading to the person who had accepted the bill of exchange" drawn against the goods and attached to the bill of lading, and it was ruled that an alleged custom of trade to retain the bill of lading until payment of the secompanying draft on account of the consignment was exceptional, and was not established as being the usual course of business. In Schuhart et al. v. Hall et el., 89 Md. 590, which was a case of a time-draft, accompanied by a bill of lading, hypothecated by the drawer, both for the acceptance and the payment of the draft, and when the drawers had been authorized to draw against the cargo shipped, it was said by the court "under their contract with the defendants the latter were authorised to draw only against the cargo of wheat to be shipped by the Ocean Belle, and they (the drawees) were, therefore, not bound to accept without the delivery to them of the bill of lading." See also the language of the judges in Gurney v. Behrend, 8 E. & Bl. 622; Marine Bank v. Wright, 48 N. Y. 1; Cayuge Bank v. Daniele, 47 N. Y. 681.

We have been unable to discover a single decision of any court holding the opposite doctrines. Those to which we have been referred as directly in point, determine nothing of the kind. Gilbert v. Guignon, Law Rep. 8 Ch. App. 16, was a contest between two holders of several bills of lading of the same shipment. The question was which had priority. It was not at all whether the drawes of a time-draft against a consignment has not a right to the bill of lading when he accepts. The drawer had accepted without requiring the surrender of the first endorsed bill of lading, and the Lord Chancellor, while suggesting a query whether he might not have declined to accept unless the bills of lading were at the same time delivered up to him, remarked, "if he was exactly the same thing as if he had previously and originally authorized that source of preceeding, and that (accerding to the Chanceller's

view) was actually what had happened in the case." Nothing, therefore, was decided respecting the rights of the holder of a time-draft, to which a bill of lading is attached, as against the drawes. The contest was wholly inter alies parts.

Segmour v. Newton, 106 Mass. 272, was the case of an acceptance of the draft, without the presentation of the bill of lading. In that respect it was like Gilbert v. Guignen. No question, however, was made in regard to this. The acceptor became insolvent before the arrival of the goods, and all that was decided was that, under the circumstances, the jury would be authorized to find that the lies of the shippers had not been discharged. It was a case of stoppage in truncitu. It is true that, in delivering the opinion of the court, Chief Justice CHAPMAN said, "the obvious purpose was that there should be no delivery to the vendee till the draft should be paid." But the remark was purely obitor, uncalled for by anything in the case. Newcomb v. The Boston and Lowell Railroad Corporation, 115 Mass. 280, was also the case of acceptance of sight-drafts without requiring the delivery of the attached bills of lading, and the contest was not between the holder . of the drafts and the acceptor. It was between the holder of the drafts with the bills of lading and the carrier. We do not perceive that the case has any applicability to the question we have new under consideration. True, there, as in the case of Seymour v. Newton, it was remarked by the judge who delivered the opinion, "the railroad receipts were manifestly intended to be hold by the collecting bank as security for the acceptance and payment of the drafts." Intended by whom? Evidently the court meant by the drawess and the bank, for it is immediately added: "they continued to be held by the bank after the drafts had been nocopted by Chandler & Co. (the drawece), and until, at Chandler & Co.'s request, they were paid by the plaintif, and the receipts, with the drafts still attached, were endorsed and delivered by Chandler & Oo. to the plaintiff." In Stollenwork et al. v. Thatcher ot al., 115 Mass. 234 (the only other case cited by the defendants in error as in point on this question), there were instructions to the agent to deliver the bill of lading only on payment of the draft, and it was hold that the special agent, thus instructed, sould not bind his principal by a delivery of the bill without such payment. Nothing was decided that is pertinent to the present case. In Bank v. Dayley, reported in the same release, p. 238, where the

instructions given to the collecting agent were, so far as it appears, only that the drafts and bills of lading were remitted for collection, and where acceptance was refused, Chief Justice GRAY said "the drawers of the draft attached to each of the bills of lading were not entitled to the bill of lading or the property described therein, except upon acceptance of the draft." It is but just to say, however, that this remark, as well as those made by the same judge in the other Massachusetts cases cited, was aside from the decision of the court.

After this review of the authorities cited, as in point, in the very elaborate argument for the defendants in error, we feel justified in saying that, in our opinion, no respectable case can be found in which it has been decided that when a time-draft has been drawn against a consignment to order, and has been forwarded to an agent for collection with the bill of lading attached, without any further instructions, the agent is not justified in delivering over the bill of lading on the acceptance of the draft.

If this, however, were doubtful, the doubt ought to be resolved favorably to the agent. In the case in hand, the Bank of Commerce having accepted the agency to collect, was bound only to reasonable care and diligence in the discharge of its assumed duties: Warren v. The Suffolk Bank, 10 Cush. 582. In case of doubt, its best judgment was all the principal had a right to require. If the absence of specific instructions left it uncertain what was to be done further than to procure acceptances of the drafts, and to receive payment when they fell due, it was the fault of the principal. If the consequence was a loss, it would be most unjust to cast the loss on the agent.

Applying what we have said to the instruction given by the learned judge of the Circuit Court to the jury, it is evident that he was in error. Without discussing in detail the several assignments of error, it is sufficient for the necessities of this case, to say it was a mistake to charge the jury as they were charged, that "in the absence of any consent of the owner of a bill of exchange, other than such as may be implied from the mere fact of sending 'for collection' a bill of exchange with a bill of lading pasted or attached to a bill of exchange, the bank so receiving the two papers for collection would not be authorized to separate the bill of lading from the bill of exchange and surrender it before the bill of exchange was paid." And again, there was error in the fellowing portion

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of the charge: "But if the Metropolitan Bank merely sent to the defendant bank the bills of exchange with the bills of lading attached for collection, with no other instructions, either expressed or implied from the past relations of the parties, they would not be so justified in surrendering (the bills of lading) on acceptance only." The Bank of Commerce can be held liable to the owners of the drafts for a breach of duty in surrendering the bills of lading on acceptance of the drafts only after special instructions to retain the bills until payment of the acceptances. The drafts were all time-drafts. One, it is true, was drawn at sight, but in Massachusetts such drafts are entitled to grace.

What we have said renders it unnecessary to notice the other assignments of error.

The judgment of the Circuit Court is reversed and the record is remitted, with directions to award a new trial.

Supreme Judicial Court of New Hampehire. WIIIPPLE a. GILES.

The contract of a married woman to pay for services of an attorney in plants. ting a likel for divorce against her husband is not binding.

A married woman cannot bind herself by a more personal contract so that an action can be maintained against her after the coverture has cancel, nor will such contract be implied against her by reason of services rendered desired against her by reason of services rendered desired.

Assumpsit.—The plaintiff was employed by the defendant, as an attorney-at-law, to procure for her a divorce on the interest ground of extreme cruelty, and it was for services so rendered with this suit was brought. After the testimony had been taken, the proceedings for divorce were abandoned by her, and she district the plaintiff to proceed no further, and the defendant therefore lived with her husband as his wife until his death some years two after. Since the death of the husband this suit was brought for the plaintiff could maintain his action, he was to have judgments for the amount of his claim and taxable costs, otherwise a nontule was to be outered.

LADD, J.—It is settled that the common-law disability of & married woman to bind herself by contract, is not removed by statute in this state, except so far as regards her contracts respecting property which she holds in her own right. That was so decided in Balley v. Pearson, 29 N. H. 77, upon the statute of 1846,

which was not materially different from Gen. Stats., ch. 164, sect.

18, and has been repeatedly reaffirmed since. This scene to me quite decisive of the present case. There is no just sense in which a contract by a married woman for the services of an attorney in procuring for her a divorce, can be said to be a contract respecting her separate property, even if she had such property; which does not here appear. I think the action cannot be maintained.

CUSHING, C. J.—"Assumpsit upon a more personal contract made during coverture will not lie against a married woman, whether her husband be joined in the suit or not, unless such contract was made in respect to property held by the wife to her sole and separate use:" Carleton v. Haywood, 49 N. II. 814.

"Where a feme covert, holding property under the Act of 1846, signed a promissory note during the coverture, which did not appear to have been given on account of any contract growing out of the property—held, that it could not be recovered:" Bailey v. L'earson, 29 N. II. 77. Substantially the same doctrine is hold in Eaton v. George, 40 N. II. 258; see, also, Brown v. Glince, 42 N. II. 100; Eaton v. George, 42 Id. 875; Ames v. Foster, Id. 881; Shannon v. Canney, 44 Id. 592; Leach v. Noyee, 45 Id. 864.

It appears from the cases cited, that, independently of statutory exceptions, it is generally true that a married woman cannot be bound by any contract expressly made by her during her coverture, or implied against her by reason of matters arising during the same time. I see nothing in the facts stated in this agreed case to take it out of the operation of the general rule in the case of Morrie v. Palmer, 89 N. H. 128, where it was held that the services and expenses of an attorney employed by a married woman were necessaries; it was also held that the husband, and not the wife, was liable for them. It appears to me, therefore, that according to the agreement, there must be judgment of non-suit.

SMITH, J.—At common law the contract of a feme covert, with certain very limited exceptions, was void, and no action could be maintained thereon against her.

Under Gen. State., ch. 164, sect. 18, she has the same rights and remedies in relation to any property which she holds in her own right, and may sue and be sued in her own name upon any contract by her made or for any wrong by her done in respect to such property, as if she were unmarried. The statute does not,

a married woman, other than those regarding such property. This is well settled in all the cases that have come before the court since the passage of the Act of 18-16, which was the first departure from the doctrine of the common law in the legislation of this state;—see authorities cited in defendant's brief. It seems wholly unnecessary to refer to the cases upon this subject in our reports. A single case will suffice;—see Shannon v. Canney, 44 N. H. 592, where it was held that "a married woman is not bound by a premissery note given during coverture, although at the time of her marriage she had, by inheritance, both real and personal estate, unless it be shown that such estate was held to her sole and separate use, and that the promise was made in respect to that estate."

There can be no pretence that the contract made by this defendant with the plaintiff had any reference to or connection with any property held by her in her own right. It follows, therefore, that this action cannot be maintained.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.*
SUPREME JUDICIAL COURT OF NEW HAMPOHIRE.*
SUPREME COURT OF NEW JERSEY.*
SUPREME COURT OF ONIO.*
SUPREME COURT OF PENNSYLVANIA.*

ACTION.

Joinder of Parties—Not necessary where no Unity of Estate.—The plaintiffs were owners of the franchise of a farry over the Delaware river from the town of C. to the opposite Pennsylvania shore, under a grant by the legislature of New Jerney. One D. was the owner of the landing on the Pennsylvania shore, and had a grant from the legislature of Pennsylvania of the exclusive right of ferringe from that shore. By arrangement between the owners of the two franchises, a ferry was run between the two lendings for mutual benefit. The ferry was made valueless by the erection of the defendants' bridge over the river. In precedings to recover componentials for the injury to the ferry, under defendants' charter, Achi, that the action was properly brought by the plaintiffs, without joining the owner of the Pennsylvania franchise.

¹ From J. W. Wallace, Erq., Reporter; to appear in vol. 28 of his Reports.

^{*} From John M. Shirley, Ecq., Reportor; to appear in 88 M. M. Reports.

^{*} From G. D. W. Vroom, Rog.; to appear in vol. 7 of his Reports.

^{*} From R. L. De Witt. Beg., Reporter; to appear in 25 Ohio State Reports.

There being no unity of estate in the several owners of the two franchises, the interest affected was several, and although the injury to each was due to a common cause, separate actions must be brought: Columbia Bridge Co. v. Geisse, 9 Vroom.

AGENT.

Tenant of Corporation, under Lease made by Agent, cannot dispute Agent's Authority—Ratification of Agent's Acts—Evidence of Authority.—If a tenant cuters into possession of promises under a parol lease, made by the attorney of a corporation, the tenant will not be permitted to dispute the agent's authority if the company subsequently ratifies the agent's act: Brahn v. Jersey City Forge Company, 9 Vroom.

An agent who demands possession for his principal, must have authority to make the demand at the time of making it. A subsequent assent on the part of the landlord will not establish, by relation, a notice

given in the first instance without authority: Id.

It is not necessary to prove an express authority to the agent; it may be inferred from circumstances which show the concurrence of the prin-

cipal in his act: Id.

It is not necessary to show the tenant by proof at the time of the service that the agent had due authority; it is sufficient if such authority actually exists: Id.

Perol Proof of Agency.—Agency, as a question of fact, may be proved by the acts, declarations or conduct of the principal and agent, although the agent was appointed by power of attorney: Columbia Bridge Co. v. Geisse, 9 Vrocen.

Anendment.

Fleading—False Imprisonment.—In trespass for assault and battery, the declaration may be amended so as to include an allegation of unlawful detention or imprisonment: Cakill v. Terrio, 55 N. H.

ATTACHMENT.

Municipal Corporation subject to.—A municipal corporation is subject to garnishment under our attachment act: Mayor, &c., of Jersey City v. Horton, 9 Vroom.

ATTORNEY.

Authority to refer pending Cause.—An attorney of record, in an action which had been sent to a referee by order of court, signed an agreement in writing that the report of the referee should be final, and the agreement was entitled as of the term of the Circuit Court, to which the report was to be made. Held, that his client was bound by such agreement: Breeks v. New Durham, 55 N. H.

BANKRUPTCY.

Fraud-Adverse Proceedings under a Judgment by Default, not Fraudulent per se.—A creditor such a debtor and obtained judgment by default, under which his goods were sold by the sheriff; within four mouths, proceedings in benkruptcy were commenced against the debtor, who was adjudged a bankrupt. These proceedings were not per se in

that the debter was insolvent at the time: Loucheim Brothers v. Henssey, 77 Pa.

In an action against the marshal for the sale of goods claimed to be the plaintiff's, although the uncontradicted evidence of plaintiff showed a clear case of fraud in fact, the question of fraud was for the jury: M. Actual collusion, or fraud in fact, is always for the jury: M.

Reneval of Security within Four Months of Decree—Prand.—Where a person owing money, principal and interest, for some time everdue, but secured by mortgage, accounts with his creditor and on computation a sum is found as due for the principal and interest added together, any new mortgage given for the whole and on the same property on which the former mortgage was given, is not, upon satisfaction being entered on the old mortgage, to be considered as a new security and co open to attack under the Bankrupt Law, if made within four months before a decree in bankruptey against the debtor. If the old security was not a preference, neither will the new one be so. They are to be considered as being for the same debt: Burnhisel v. Firman, 22 Wall.

CAPTURED AND ARABDONED PROPERTY.

Executed and Executory Contracts.—On the Sist of July 1868, during the late rebellion, E. and C., owning certain crops of cotton in Wil-

kinson county, Mississippi, executed a paper thus:

"We have, this 31st of July 1863, sold unto Mr. L. our crops of cotton, now lying in the county aforestid, numbering about 3100 bales, at the price of ten cents per pound, currency, the said cotton to be delivered at the landing of Fort Adams, and to be paid for when weighed. Mr. L. agreeing to furnish, at his cost, the bagging, rope, and twine necessary to bale the cotton unginned, and we do acknowledge to have received, in order to confirm this contract, the sum of thirty deliars. This cutton will be received and shipped by the house of D. & Co., New Orleans, and from this date is at the risk of Mr. L. This cutton is said to have weighed an average of 500 pounds when baled."

At the time of making the contract, the cotton baled was stored under a covering of boards, and a small part of the cotton (about twenty bales) not baled, was in the gin-house on the Buffalo Bayou, about ten miles from the Mississippi river, at a place known as "The Rocks," or "Felter's Plantation," then without the Federal military lines; and C. and L. were together there. Immediately after the sale, L. employed a person, living near where the cotton was stored, to watch and take care of the same, and paid him therefor; and this person continued his care of it, till it was taken possession of in the name of the United States. Hold, that, notwithetanding the words above italicized, the paper of the Sist of July 1863 was executory only and had not directed E and C. of their property in the cotton; no money but the thirty deliars having been paid, and nothing else done in execution of the contract; and that in a suit for the proceeds of it under the Captured and Abandoned Proporty Act, which gives to the "jowner" a right to recover, under certain circumstances, property captured or abandoned during the late civil war, they alone could one: The Eiger Cotton Classe, 22 Wall.

The same E. and C. (or rather E. alone, who had now become sale sware of the cetten) subsequently to the above-quoted contract with L.

made another contract with N. (he not having notice of the first contract), by which E. contracted for the sale to N. "for so much of the 3100 bales as N. should get out in safety to a market, for the price of 151 per bale, to be paid at Liverpool. The risk of the cotton to be out the vendors." Ileid, equally, but as a matter even more plain than in the former case, that no property passed by the contract; no cotton ever having been got out. Ileid, further, that this was not altered by a latter in these words from the owners of the cotton:

"It having been agreed on between you and myself, that I sell to you all the cotton of E. and C. now baled and under shed, for the price of 18th sterling, per bale, payable in Liverpool, you will cause the same to be placed to my credit with J. A. J. & Co., of Liverpool:" Id.

CHURCH. See Taxation.

Presbyterian Church Government—Acts of Synod ultra vires.—In the Reformed Presbyterian Church, the General Synod, its highest judicatory, is bound by its system of religious principles with the same force on individual members: McAuley and others' Appeal, 77 Pa.

A congregation, organized and holding its property as a constituent part of any particular religious denomination, or in subordination to its government, which, without just cause, severs such connection or government, forfeits its rights and property to those who maintain the

original status: Id.

If such severance be alloged, the burthen is upon those alleging to show that the others voluntarily, by their own set and without sufficient cause, renounced their connection with the general organization and invaded the chartered rights of their fellows to the church property: id.

A Presbytery of the Reformed Presbyterian Church, deeming that acts of the Synod were in disregard of the constitutional rights and jurisdiction of the Presbytery, resolved to suspend its "relations to Synod until such action be revoked, or (it) obtain further light, and in the meantime remain in the Reformed Presbyterian Church," &c. If

the allegations were correct, the Presbytery was justified: Id.

The resolution having been laid before Synod, it, without notice or trial, resolved that the officers and members of the Presbytery were out of the jurisdiction of the Synod; and such officers and members of the Fifth Congregation (and others) who might not identify themselves with the act of Presbytery, &c., be declared the Fifth Congregation, &c.: Held, that this action of Synod did not unchurch the Fifth Congregation, &c.:

By the Presbyterian policy, officers and members of a church cannot be unchurched by an arbitrary decree of Synod without notice or trial, although the admitted act complained of be contumecious and worthy

of ecocure : Id.

A Presbyterian congregation dose not select its representatives to its higher courts; the paster is a delegate by virtue of his office, and the lay representative is chosen by the Session; a congregation cannot be chargeable with the acts of its delegates: Id.

The excision of the Presbytery could not work the deposition of off-

corn in the church proviously called and ordelned: Id.

. Under its tegiclative powers Synod may dissolve a Presbytery and

essign its churches to some other Presbytery; under its judicial powers, it may, for proper cause and in due form, depose a presbyter, dissolve churches and reorganise them: Id.

A legislative act of Synod which forfeits the franchises and property of a congregation, is in the nature of a judicial sentence and inopera-

thre; it is with since: Id.

Synod has no more power to exected a church than a state legislature to exected a county; the forfaiture of its rights by the church must be made to appear by a regular judicial decree: Id.

The only constitutional method by which a congregation can express

itself is by congregational meetings regularly called: Id.

The theree of excision of the Synod amounted at most but to a dimplution of the original compact of union, leaving the several churches free to seek their own connections or to arrange themselves as might seem meet, provided they did not radically depart from the faith or doctrines under which they were organized: Id.

COMMON CARRIER.

Delivery—Goods marked C. O. D.—A bailes of goods, sending them by a carrier, may see the carrier for the delivery of the same to the consignes without payment, when payment was imposed as a condition of delivery: Murray v. Warner, 55 N. II.

CONFEDERATE NOTES.

Debter and Crediter—Phyment in Notes not Legal Currency in the United States.—After the late rebellion broke out, debters in the rebellions states had no right to pay to the agents or trustees of their creditors in the loyal states, dobts due to these last in any currency other than legal currency of the United States. Payment in Confederate notes or in Virginia bank notes (recurity for whose payment was Canfederate bonds, and which notes like the bonds themselves never, after the rebellion broke out, were safe, and before it closed had become worthless), held to have been no payment, and the debter charged do note: Prets v. Stover, 22 Wall.

CONFLICT-OF LAWS. See Execution.

CONSTITUTIONAL LAW. See Ferry.

Title of Act.—It is sufficient if the title of an act fairly give notice of its subject on as reasonably to lead to any inquiry into the body of the bill: State Line and Junicita Railroad Co.'s Appeal. 77 Pa.

An original set was, "To incorporate the State Line, &c., Railreed," another was "A supplement to an set to incorporate the State Line, &c., Railread;" another, "A further supplement to an set to incorporate the State Line, &c., Railread." All the provisions in both supplements related to the State Line, &c., read. The object of the supplements was sufficiently expressed in their titles, the object being germane to the original set: Id.

CONTEMPT.

Res adjultate—Batting up Title after Injunction and Final Decree.
—In the original decree in the case of Iwas v. White & Chile, 7
Wall. 700, the deleadants were perpetually enjoined from setting up

eay claim or title to any of the bonds, or coupons attached to them, which were the subject-matter of the suit. The bill, answers, and proceedings in the case show that the purpose of the suit was to establish the title of the state to these bonds, and to free it from the embarrasement of the claim of defendants: In re Chiles, 22 Well.

All parties to the suit were, therefore, bound by the decree as to that title, and because Chiles was the owner, or now asserts himself to be the owner, through a transaction not set up in his answer, he is not the less?

concluded and bound to obey the above injunction: Id.

Notwithstanding he now asserts a different title, or source of title, held by him when the suit was brought, from the one imputed to him in the suit and defended by him, he is in contempt of court in setting up and seeking to enforce his claim: Id.

Punishments for contempt of court have two aspects, namely: 1. To vindicate the dignity of the court from disrespect shown to it or its orders. 2. To compel the performance of some order or decree of the court which it is in the power of the party to perform and which he re-

fuses to obey: Id.

In the present case there is no part of the original decree which Chiles can perform which remains unexecuted, and no additional order or decree can be made for him to perform in this proceeding for contempt. The court, therefore, sentences him to a fine of \$250 and costs for his contempt in setting up a claim of title to seventy-six of the bends mentioned in the decree: Id.

CORPORATION. See Agent.

Treasurer—Interference with by Directors.—The treasurer of a corporation is the proper efficer charged by law with the custody of its funds, and responsible for their safe keeping. The directors cannot lawfully deprive the corporation of the benefit of this responsibility by depositing the funds with others for safe keeping, or causing such disposition of the funds to be made, and may be restrained by injunction from so doing at the suit of any stockholder, on a proper case being made: Pearson v. Hower, 55 N. H.

COVENANT. See Deed.

CRIMINAL LAW. See Habeas Corpus; Intoxicating Liquors.

Confessions—Matives of others jointly Indicted, but on Separate Trial—Declaration.—The burden of showing that a confession of guilt was obtained by improper inducements rests with the defendant: Rufer v. The State, 25 Ohio St.

Where, on a criminal trial, a witness is offered by the state to prove a confession made by the defendant, to the admission of which testimony the defendant objects, on the ground that the confession was not voluntary, it is the right of the defendant to inquire of the witness and prove his objection before the confession is given in evidence; and it is error for the court, in such case, to refuse him leave to make such examination until after the examination in chief has been concluded and the confession given to the jury: Id.

Where it is shown that two or more persons acted in concert in the commission of an alleged murder, it is competent for the state, by proper

testimeny to show, upon the separate trial of one, the motives which actuated the others in the alleged homicide: Id.

But ill feeling toward the deceased, on the part of these not on trial, cannot be proved for the purpose of showing a conspiracy between them and the defendant to commit the homicide: Id.

Nor can the declarations of those not on trial be proved in such case, to show their motives or malice on their part toward the deceased, unless such declarations were made during the pendency of the conspiracy and in furtherance of the common design: Id.

Where an act or transaction is given in evidence for the purpose of showing the motive or state of mind which actuated the parties to it, it is proper, at least as a general rule, to permit the parties to be affected to show the immediate circumstances which led to the transaction, otherwise the real object of the inquiry may not be accertained: Id.

DAMAGES. See Eminent Domain.

DEBTOR AND CREDITOR. See Execution.

Sale—Secret Trust—Reservation of use of Chattel by Vender.—Upon the sale of a chattel, it was agreed as part of the bargain, that the vendor should still have the right to use the thing sold, in and about his business. Held, that such reservation, being inconsistent with an absolute sale, constituted a secret trust, from which fraud as to the creditors of the vendor was an inference of law; and that the actual intention of the parties would not be inquired into: Long v. Stockwell, 56 M. H.

DEED. See Easement.

The of Premises Conveyed—Covenant Binding on Grantee's Assigna.

—A stipulation in a deed of conveyance, whereby the grantee, in part consideration for the conveyance, agrees for himself, his heirs, and assigns, that the premises conveyed shall not be used or occupied as a hotel, so long as certain other property, owned by the granter, shall be used for that purpose, binds both the grantee and ail claiming under him, and may, in equity, be enforced by injunction: Stince v. Derman, 25 Ohio St.

RASSMENT.

Water—Aqueduct not having become a legal Easement, will not pass under the word Appurtenance in a Dead.—A. conveyed to S. a tract of land with buildings thereon, supplied with water from a spring on land of H., by an aqueduct. In describing the premises conveyed, no meation was made of the aqueduct, or of any easement in the land of H. Following the description was the habendum in these words: "To have and to hold the said granted premises, with all the privileges and appurtenances to the same belonging." Held, that the word "appurtenances" in the habendum would not be construed to convey an easement in the land of H., which, not having ripened into a legal right, had not become legally attached to the premises conveyed: Spending v. Abbet, 55 N. H.

By the use of the word "appurtenances" in the habendum of a deed, an ensement will not peer unless legally appurtenant to the land in the hands of the granter: Id.

An assement will not ness when not legally appurtenest to the had,

unless the deed contain proper words describing it, and showing the intention of the granter to pass it: Id.

EMINENT DOMAIN.

Land Damages—Property in Trees after Assessments.—After damages have been assessed, on a condemnation of land for a railroad, the trees which may be useful in the construction of the road, standing on the tract taken, become the property of the company: Taylor v. New York & Long Branch Railroad Co., 9 Vroom.

Land Damages—Legal or Megal Assessment.—Where a legal and illegal assessment for benefits are so blended that they cannot be separated, the whole assessment will be set aside; but application may be made for a re-assessment: State, Randolph & Stelle, proc., v. City of Plainfield, 9 Vroom.

Land Damagra—Natice to Owner.—Where the charter provides for constructive notice of improvements by publication, personal notice is not required: State, Boice, pros., v. Plainfield, 9 Vroom.

It is the right of a landowner expecially affected by a public improvement, to be informed either by actual or constructive notice of the time and place appointed for the meeting of counsel to consider their proposed action: Id.

Error. See Trial.

Objection not made in Court below.—When a party excepts to the admission of testimony, he is bound to state his objection specifically, and on error he is confined to the objection so taken: Columbia Bridge Co. v. Geisse, 3 Vroom.

EVIDENCE. See Agent; Criminal Law; Error; Ferry.

EXECUTION.

Exemption from—Attackment by Creditor in another State—Injunction.—Under the provisions of the code of civil procedure which relate to attackment proceedings, and proceedings in aid of execution, the carnings of a debtor for the three months next preceding the levy of an attackment, or the issuing of an order for the examination of the debtor, are exempt from being applied to the payment of his debts, where the same are necessary for the support of his family: Snook et al. v. Snetzer, 25 Ohio St.

A citizen of this state may be enjoined from prosecuting an attachment in another state, against a citizen of this state, to subject to the payment of his claim the earnings of the debtor, which, by the laws of this state, are exempt from being applied to the payment of such claim: Id.

FERCE. See Railroad.

Frant.

Legislatice Grant—Title of Grantee to Landing-Place—Damages for Destruction of Ferry.—The legislative grant of a ferry-franchise is valid, although the grantee has not title to the landing-places which are named as the termini of the ferry: Columbia Bridge Co. v. Geisse, 2

The grant by one state of a ferry-franchise over a river which is the boundary between it and another state is valid; and it is not necessary to the validity of such a grant that there be concurrent action by both states, nor that the grantee have the right of building beyond the state by which the grant is made. His franchise for that reason may be less valuable, but it is good so far as his own property-rights are concerned, or the jurisdiction of the state making the grant extends: Id.

In an action to recover damages for the injury suffered in the destruction of a ferry by the erection of a bridge, the income derived by the plaintiff from tolls received in preceding years, is competent evi-

dence to show the value of the ferry : Id.

In such action, the rates of tolle fixed by the Roard of Cheson Freehelders, under the act concerning ferries (Niz. Dig. 837), certified by the clerk of the board, are competent evidence, although such rates were fixed when the plaintiff worked it as such, before he had obtained a legislative grant of the franchise. The evidence was competent to show what the public authorities having power to establish the rates of ferriage considered as reasonable tolls for the ferry: Isl.

FRAUD. See Debtor and Creditor.

HABRAS CORPUS.

Review of Criminal Proceedings by.—Habeas corpus is not the proper mode of redress, where the relator has been convicted of a criminal offence, and sentenced to imprisonment therefor by a court of competent jurisdiction; if errors or irregularities have occurred in the proceedings or sentence, a writ of error in the proper remedy: Experts Van Hagan, 25 Ohio St.

HUSBAND AND WIFE.

Mortgage by Wife—Equities between Wife and Husband where Properly partly paid for by each.—Weyman, by parol, bought land from O'liara, took puncesion, made improvements and paid part of the purchase-money from Butterfield, paid it to O'liara, who made the deed to her, and she mortgaged to Butterfield, the husband not joining. Held, that the husband owning the equitable title, could not compel a conveyance of her legal title without refunding the purchase-money she had paid: Butterfield's Appeal, 77 Pa.

Bettericki recovered judgment against the wife on his mortgage; the land was sold by the sheriff on a municipal claim against both husband and wife. Held, that this divested the title of both, and in the distribution of the proceeds, Butterfield was entitled on his judgment to recover the amount of the wife's interest in the fund, being the purchase-

money which she had paid : Id.

If the controversy had been between the husband and wife, the fund would be divided between them in accordance with their respective rights and equities; the wife's being the sum paid by her with interest to the shoriff's sale; and the husband's the remainder of the fund: M.

Although the mortgage by the wife were void, the judgment conclusively established its execution; the mortgage was merged in the judgment, which could not be collaterally impeached, except for fraud: M.

INJUNCTION. See Contempt.

INTEREST.

Special Rate continues after time agreed upon has expired.—Under the Act of March 14th 1850, allowing parties to contract for any rate of interest, not exceeding ten per cent., a note calling for interest at a rate higher than six per cent. carries the agreed rate after due, and until paid, as well as during the time it is made to run: Monnett v. Sturyer, 25 Ohio St.

An agreement to pay interest semi-annually, at the rate of ten per cont. per annum, is not usurious within the meaning of said act: Id.

Special Agreement not carried out—Excess above Legal Rate.—Where a party agrees, by note, to pay a certain sum at the expiration of a year, with interest on it at a rate named, the rate being higher than the customary one of the state or territory where he lives, and does not pay the note at the expiration of the year, it bears interest not at the eld rate but at the customary or statute rate: Burnhisel v. Firman, Assignee, 23 Wall.

If, however, the parties calculate interest and make a settlement upon the basis of the old rate, and the debtor gives new notes and a mortgage for the whole on that basis, the notes and mortgage are, independently of the Bankrupt Act, end of any statute making such securities void in tote as usurious, valid securities for the amount which would be due on a calculation properly made. They are bad only for the excess above proper interest: Id.

INTOXICATING LIQUORS.

Charter of Municipal Corporation—Power to License—Complaint for violating Ordinance.—When the charter of a municipal corporation gives the common council power to license inns and taverns, and also power to license wholesale liquor dealers, liquor cannot be sold by the quart without license, in violation of a city ordinance: Roberson v. Lambertville, 9 Vroom.

A complaint which charges that the complainant had just cause to suspect, and does suspect, that the defendant is guilty of violating the city ordinance, without averring that he is guilty, is not made with such reasonable certainty as to be the ground of a judicial determination, conviction and soutenes. It differs from a proceeding to obtain a warrant to arrest an offender to answer to a more formal complaint by indictment in another court: Id.

The complaint is fatally defective in failing to state to whom the liquer was sold, without showing that it was sold to a person unknown. The only allegation is that it was sold to "each of various and divers persons:" Id.

The ordinance under which the procedution was instituted prohibits the sale of liquor without license, "except such as shall be compounded and intended to be used as medicine." The complaint must negative this exception: Id.

JUDGMENT.

Assignment of Single Bill—Subsequent Assignment of Judgment.—Pratt entered into a note as surety for Strickland, who at the same time

assigned to Pratt, as security, and delivered to him, a bill single with warrant, on which judgment had been entered in favor of Strickland; the judgment was not marked to Pratt's use on the record; Pratt paid the note. Strickland being indebted to Christman, afterwards effered to confess judgment for this debt or assign the first judgment as collaberal. Christman, after examining the record, took the assignment, Pratt still holding the bill with warrant; the judgment was marked to Christman's use: Ilcld, he was not a purchaser for value and was past-poned to Pratt: Pratt's Appeal, 77 Pa.

The non-delivery to Christman of the note on which the judgment

was entered, was not notice of the prior assignment: Id.

LANDLORD AND TENANT. See Agent.

MORTGAGE.

Recording Assignments—Notice to Subsequent Assignees.—Under Act of April 9th 1849, sect. 14, recording the assignment of a mortgage is notice to a subsequent assignee: Prepar's Appeal, 77 Pa.

Where recording an iuntrument under the Acts of Assembly la diseretionary, and the instrument is recorded, all the incidents and force

of a public record attach to the record: Id.

A mortgage was assigned by an attorney in fact of the mertgages; the assignment was recorded; the assigned permitted the papers to remain with the attorney, who afterwards assigned the mortgage to another who had no actual notice of the prior assignment. Hold, that the first assignes was outified to the proceeds of the mortgage: M.

MUNICIPAL CORPORATION. See Attachment.

Negligence.

Bailment for Hiro—Degree of Cure.—C. bailed to B. a home, for hire, to convey him from D. to S. B., upon arriving at S., put up the horse in a proper place, and the next morning properly watered, fed, and cared for her, and left her, intending to return, and in fact returning, within a suitable time to care for her, but having reason to apprehend that A., sixteen years of age, would attempt to water the herse during his absence. A. turned the horse loose to water her, and the horse, in consequence thereof, became lamed. Held, by the court sitting for trial without a jury, that these facts aboved no evidence of lack of ordinary care and prudence on the part of B., and that he was not liable to C. for the damages: Chase v. Boody, 55 N. H.

Action for Death caused by— Who may maintain—Demages.—Under the set requiring "compensation for exacing death by wrongful act, neglect or default," etc., persons who had no legal claim for support upon the deceased may, as next of kin, have an action maintained for their benefit, to recover the compensation allowed by the statute: Gretenbessper et al. v. Harris, Adm'r, 25 Ohio St.

In such cases, in determining the pectationy injury resulting from the death, the reasonable expectation of what the next of kin might have received from the deceased, had he lived, is a proper subject for the

consideration of the jury: Id.

PLEADING.

Traverse de Injuria.—The replication de injuria, is only allowed where the plea is in excuse, and not in denial of the cause of action: Ruchman ads. Ridgefield Park Railroad Co., 9 Vroom.

It may be used in our practice in actions ex contracts, wherever a special plea in excuse of the alleged breach of contract can be pleaded as a general traverse to put in issue every material allegation in the plea:

N. Whe

When the defendant pleads that the power to cancel a subscription for stock is derived from the original agreement between the parties, and has been exercised, the plaintiff cannot reply by the general traverse de injuris: Id.

RAILROAD.

Fences—Limbility to Tresponsers.—A railroad corporation is not liable for damages done to cattle unlawfully in a pasture adjoining, and escaping themes upon its roads through defective fences which the railroad is bound to keep in repair: Giles v. Boston & Maine Railroad, 55 N. II.

REPLEVIN.

Bond in—Liability of Surety where Judgment is for a return of the Goods.—In a suit on a replevin bond given to the sheriff, where the question whether the proper party to sue is the sheriff or the party for whose benefit the bond was given, depends upon the code of practice of Montana Territory, this court will not reverse the decision of the Supreme Court of that territory on the question; that being a question on the construction of their own code: Succeey et al. v. Lomme, 22 Wall.

In a suit on a repleviu bond the defendants cannot avail themselves of the failure of the court to render in the replevia suit the alternative judgment for the return of the property or for its value; even if that were an error for which that judgment might be reversed: Id.

If a return be awarded in the replevin suit, the surety is liable on the condition of the bond to return, and this without execution or other demand for its return. The judgment establishes the liability: Id.

Nor is this liability to be measured in this action by the value of the interest in the property of the attachment debtor, for whose debt it was seized by the sheriff. The value of the property at the time it was replevied, limited by the debt still due on the attaching creditor's judgment and the panalty of the replexit bond, are the elements of acceptaining the damages in the suit on that bond: Id.

BALE. See Debtor and Creditor.

SHERITY'S SALE.

Re-onte after Default of Purchaser—Change of Conditions.—Land was sold by the sheriff on the condition that \$50 of the bid should be paid when it was struck down, and the remainder in ten days; if not then paid, it might be sold again, and the bidder should pay any deficiency. The bidder failed to comply; the land was exposed under an alias execution, with the condition that \$500 was to be paid when struck down; it was sold for a smaller sum than the first bid: Ifeld, there was a change of conditions, and the first bidder was not liable for deficiency: Process, Assignee, v. Husband, 77 Pa.

In an action against a purchaser at sheriff's sale refusing to comply with the conditions, for a difference of bid at a second sale, the suit must be in the name of the sheriff: Al.

STATUTE.

Construction—Apparent Contradictory Previsions.—Where a legislative act contains two sets of provisions, one giving specific and precise directions to do a particular thing, and the other in general terms prohibiting certain acts which would, in the general scare of the words used, include the particular act before authorized, then the general clause does not control or affect the specific enactment: State, Barths, proc., v. City of Trenton, 9 Yroom.

Confused Ordinance — Aid to Construction from Map. — Where an ordinance is confused, yet if by eareful reading, aided by a map, it is intelligible, it will not be avoided for uncertainty. Effect must be given, if possible, to all ordinances regularly pushed, and within the powers conferred by the charter: State, Boice, pros., v. City of Plainfield, D Vroom.

Where an ordinance is annulled for want of jurisdiction, by competent notice to the persons affected, the error is fundamental, and cannot be remedied by subsequent legislation: Id.

TAXATION.

Chain of Exemption from Toxation whether State, County or Municipal must be founded on clear Intention of Legislature—Negative Language not sufficient.—A claim of exemption from county and municipal taxation cannot be supported, any more than a claim from state taxation, except upon language so strong as that, fairly interpreted, no room is left for controversy. Ne presumption can be made in favor of the exemption: and if there be reasonable doubt, the doubt is to be solved in favor of the state: Bailey v. Magneire, Collector, 23 Wall.

The fact that in an act amending the charter of a railroad corporation special prevision is made for accertaining the taxes to become due by the corporation to the state (nothing being said about the manner of accertaining other taxes), is not of itself enough to work an exemption of the property of the corporation from all taxation not levied for state purposes. Silence, in regard to such other taxes, cannot be construed as a waiver of the right of the state to levy them. There must be comething said affirmatively, and which is explicit enough to show clearly that the legislature intended to relieve the corporation from this part of the burdens borne by other real and personal property, before such an act shall amount to a contract not to levy them: M.

A prevision in such an act, prescribing a mode for ascertaining the tax due the state, by which provision the president of the company is required to furnish to the anditor of the state a statement, under eath, of the actual each value of the property to be taxed, on which the company is directed to pay the tax due the state, within a certain time, to the treasurer, under penalties, does not amount to a contract, that the state will not pass any law to assess the property of the company for taxation for state purposes in a different manner: Ist.

But if a particular mode has been prescribed for asseming the property

of a particular company that mode should be followed, until, in some

way, a different mode is prescribed: Id.

Whether or not an act prescribing such particular mode has been impliedly repealed by a general revenue act, not in terms repealing it, is a matter psculiarly within the province of the highest courts of the state, whose acts are the subjects of the question, to decide. And when such courts have decided the question, their decision is controlling: Id.

Exemption of Church Endowment.—Lands held by trustees for a church, do not constitute a part of the "endowment or fund" of a religious society, and are not exempt from taxation: State, Nevin, et al. proc., v. Krullman, Collector, doc., 9 Vroom.

TRESPASS. See Amendment.

TRIAL

By Court without Jury—Review of Finding.—When a cause is tried by the court, without a jury, by the consent of parties, the court is substituted in the place of a jury, and its findings on questions of facts cannot be reviewed by writ of error: Columbia Delaware Bridge Co. v. Gelese, 9 Vroom.

VENDOR AND PURCHASER.

Mistake as to Encumbrance—Rescission—Equity.—Plaintiff bought a lot at a master's sale, defendant being present and bidding against him; it was amounced at the sale that there was an unopened street ever the lot, and the purchaser would be entitled to the damages; the plaintiff afterwards sold the lot to defendant, who also lived near the street, without informing him of the street. In an action for the purchase-money, the court charged that it was the duty of the plaintiff, when he sold to defendant, to inform him of the street, and not doing so was suppression of a material fact which entitled defendant to set-off the injury by opening the street. Held, to be error, as withdrawing the question from the jury: Tenbrooks v. Jakke, 77 Pa.

When there is a mutual mistake as to an encumbrance on land sold, equity relieves, not by allowing the vendee to keep the property and price, but by rescinding the contract and restoring the parties to their

former position : Id.

Outstanding Title.—A vendee under articles may set up an outstanding title not in himself, but when he buys such title, he is trustee of his vender, and is estitled only to what he paid to perfect the title: Stephens et al. v. Black et al., 77 Pa.

VERDICE.

Special.—A special verdict requires the jury to find all the meterial facts from which the law is to arise, including both disputed and undisputed facts: Vansychel v. Stemart, 77 Pa.

puted facts: Veneyobel v. Stenoart, 77 Pa.
Whatever is not found in a special verdict is to be considered as not existing; it cannot be aided by intendment or by extrinsic facts appear-

ing on the record—it must be self-outsining: Id.

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LIMITATIONS ON TAXING POWER ARISING OUT OF THE SITUS OF THE PROPERTY TAXED.

(Continued from page 15.)

5. Colleteral Inheritance Tax.—" The right to take property by devise or descent is the creature of the law and secured and protected by its authority. The legislature might, if it saw proper, restrict the succession to a decedent's estate, either by devise or descent to a particular class of his kindred, say to his lineal descendants and ascendants:" Eyre v. Jacob, 14 Gratt. 422. LEE, J., p. 480. When the legislature requires a certain per centage of the cetate passing by devise or descent to collateral kindred, it is called a collateral inheritance tax, or succession tax. It is a tax upon the civil privilege of taking the property devised or descended. Where the domicile of the decedent is in one state, and the situs of the property in another, the question arises in which state is the tax imposed. The general rule is that wherever the owner of the property is domiciled, there a tax may be imposed on the succession, although the property may be situated in amother state: Short's Estate, 16 Penna. St. 63. But where the state has control over neither the domicile of the decedent or his property, it cannot impose the tax: Hood's Estate, 21 Penna. St. 106. In the first of these cases, Short resided in Philadelphia, owned large sums invested in stocks of corporations of other states, in Tal. TTIV 17

bonds of the state of Kentucky, and a bank deposit in the state of New York. This property was held liable to the succession tax in Pennsylvania on the principle that the situs of personal property follows the domicile of the owner. In the second case, Hood was born in Philadelphia in 1786, went to Cuba in 1814, became established in business there; in 1817 formed partnership with persons residing in Philadelphia, and had correspondents there; he lived in Cuba until his death, made occasional visits to Philadelphia, and died in France in 1850, while on a visit for his health. He had estate in Pennsylvania, and large estates in Cuba. Legacies to a large amount were given to persons residing in Pennsylvania. The executor paid the collateral inheritance tax on all the property in Pennsylvania, but refused to pay on the legacies derived from property in Cuba. The executor was sustained, the court deciding that where neither the personal property taxed, nor the domicile of its owner is within the state at the time of his death, such property is not subject to the collateral juheritance tax. These cases do not conflict with the doctrine that the state in which ancillary administration of an estate is granted may impose a collateral inheritance tax on all property situated in the state: Alvany v. Powell, 2 Jones' Eq. 51 (ante, p. 71), which has a visible, tangible existence, or even upon debts, which can only be collected by the ancillary administrator, who has the legal title to them: St. Louis County v. Taylor's Administrator, 47 Mo. 594; The Attorney-General v. Hope, 1 C., M. & R. 580; 8 Bligh 44. Nor do the cases last cited maintain a doctrine that would make it proper to have sustained the tax in Hood's Estate, upon the legacies derived from the property in Cuba. When the property is of such a character that it passes by delivery, it is subject to the collateral inheritance tax or probate duty where it is situated: Attorney-General v. Bowens, 4 M. & W. 171. This tax is due when settlement is made with the legatees, although the estate is not fully settled: Atterney-General v. Pierce, 6 Jones' Equity 144.

6. Public Securities and Negotiable Instruments.—The state bonds and bonds of municipal bodies and circulating notes of banks, which are treated as property where they are, and pass by delivery, are the subject of taxation wherever they are found, in the same manner as chattels: FIELD, J., in State Tax on Foreignheld Bonds, 15 Wall. 824. Probate duty in England, is mea-

sured by the property within the jurisdiction of the court: Attorney-General v. Dimond, 1 Cr. & Jer. 870. Where a portion of the estate of the decedent was composed of Russian, Danish and Dutch bonds, which were marketable securities, transferable by delivery only, and as to which it was never necessary to do any act whatsoever out of the kingdom of England, in order to make a transfer of any of the said bonds valid, they were held liable to the probate duty: Attorney-General v. Bowens, 4 M. & W. 190. Lord ABINGER says: "No ordinary in England could perform any act of administration within his diocess, with respect to debts due from persons resident abroad, or with respect to shares or interests in foreign funds payable abroad, and incapable of being transferred here; and therefore no duty would be payable on the probate or letters of administration in respect of such effects. But, on the other hand, it is clear that the ordinary could administer all chattels within his jurisdiction; and if an instrument is created of a chattel nature, capable of being transferred by acts done here, and sold for money here, there is no reason why the ordinary or his appointee should not administer that species of property. Such an instrument is in effect a salcable chattel, and follows the nature of other chattels as to the jurisdiction to grant probate:" Attorney-General v. Bowens, 4 M. & W. 190. But where the public securities, owned by the decedent who was domiciled in England, were of such a character that they were not transferable by delivery, but only transferable in the state where they were issued, they were held not liable to such duty: Attorney-General v. Dimond, 1 Cr. & Jer. 856; Attorney-General v. Hope, 1 C., M. & R. 580; 8 Bligh 44. The securities in the first case were called rentce, inscribed in the great book of the debt public of France; and in the second, they were registered stocks of the state of New York. The same principle is contained in those cases, which hold that state or municipal bonds which are required by various states to be deposited by foreign insurance, with the treasurer or other officer, are liable to taxation as property in the state: British Com. Life Inc. Co. v. Commissioners, 40 N. Y. (4 Keyes) 308; People v. Home Insurance Co., 29 Cal. 538. It is to be observed, that the stocks which were held liable to probate duty in England, might have been held liable on the principle, that the situs of personal property is that of its owner, but the same principle would apply in the cases in which they were held not liable; the idea upon which they are based is that when the evidence of the debt is such that it passes by delivery, then the situs of the evidence of the debt is the situs of the debt, and it is taxable there. But where it is necessary that the evidence of the debt should be in the state of the debtor, in order to transfer the title to it, it is taxable in the state of the debtor, which is in accord with the Missouri and North Carolina cases on the subject: Ante, \$8, p. 69, etc. This principle extends to all negotiable instruments which pass by delivery, and they should be taxed where the instruments are situated. They are chattels personal; a negotiable note physble to the order of an unmarried woman becomes the property of her husband without her endorsement, it being a personal chattel, and not a chose in action: McNeilage v. Halloway, 1 B. & Ald. 218.

7. Steamers and Sailing Vessels.—The domicile of a vessel is its home port, or port at which it is required to be registered by the Acts of Congress, and this is the port nearest to the place where the owner or owners reside: 1 Stat. at Large 288, Bright. Dig. 824, pl. 8. The name of the vessel and of the port to which she belongs is required to be painted on her stern, on a black ground, in white letters of not less than three inches in length. Where an occan steamer, owned and registered in New York, and regularly plying between Panama and San Francisco and ports in Oregon, remaining in San Francisco no longer than is necessary to land and receive passengers and cargo, and in Benicia only for repairs and supplies, a tax assessed by the state of California and paid, was recovered back, upon the ground that the steamer was not property within the state of California: Hays v. The Pacific Mail Steamship Co., 17 How. 596. NELSON, J. "Whether the vessel, leaving her home port for trade and commerce, visits, in the course of her voyage or business, several ports, or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the state, and liable to taxation, at one port than at others. is within the jurisdiction of all or any one of them, temporarily, and for a purpose wholly excluding the idea of permanently abiding in the state, or changing her home port. We are satisfied that the state of California had no jurisdiction over these vessels for the purpose of taxation; they were not property abiding within its limits, so as to become incorporated with the other personal property of the state; they were there but temporarily, engaged in lawful trade and commerce, with their situs at the home port where the vessels belonged and where the owners were liable to be taxed for the capital invested, and where taxes had been paid." A vessel registered in the port of New York, that nearest her owner's residence, one of a regular daily line of steamers between Mobile and New Orleans, is not taxable in Alabama: Morgan v. Parham, 16 Wall. 471. The fact that such vessel is enrolled by her master as a coaster at Mobile, Alabama, and that her license as a coaster is renewed from year to year, does not affect her registry or ownership in New York, nor make her liable to taxation as personal property in the state of Alabama.

In the cases which have been noticed on this subject, the home port and residence of the owner of the vessel were in a different state from that of the vessel, and the vessel being temporarily in the state in which she was used, was not liable to taxation in such state. But where the owner of a steamer resides in the state and the versel is engaged on the waters of a river of that state, wholly within the state, the vessel is taxable in such state, notwithstanding she is registered and enrolled as a coasting vessel under the Acts of Congress. And it would seem that a vessel se engaged would be taxable in the state on whose waters she was plying, even if the owner resided in another state: Battle v. Corporation of Mobile, 9 Ala. 284; Minturn v. Haye, 2 Cal. 590. The charter of the city of New Albany allowed it to tax all real and personal property within the city. Meckin, a resident of the city, was part owner of a steamboat, enrolled at Louisville, and which touched occasionally at New Albany; a tax imposed on Meekin for his share of the best was held illegal; it was not property within the city; and in a similar case, it was held the situs of a vessel is the place of its registration and port from which it regularly departs and returns: The City of New Albany v. Meckin, 8 Ind. 481; Wilkey v. The City of Pekin, 19 Ill. 160, s. P. The city of St. Louis, by its charter, had precisely the some power as New Albany. The St. Louis Ferry Company was incorporated in Illinois, and had an effice there; the company were engaged in carrying passengers and freight across the river from St. Louis, Missouri, to East St. Louis in Illinois. The boats only touched at the wharf in St. Louis, as one of the termini of the voyage, and were not allowed to remain there more

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than ten minutes, in pursuance of an ordinance of the city. When not in actual use, they were laid up in Illinois; their pilots and engineers resided there; their real estate and warehouse on it were there. The boats were enrolled in St. Louis; the company had an office there; its president, vice-president and principal officers lived there; the stockholders mainly resided there, and none of them in . Illinois; the ordinary meetings of the directors were held, and its moneys received and disbursed, and corporate scal kept in St. Louis. The company paid to the city of St. Louis an annual ferry license; it crected, by permission of the city, wharf-boats at its wharf or public landing; it paid wharfage to the city at a stipulated annual amount, it was assessed and paid taxes on the value of the wharf-beats within the city limits. The city of St. Louis laid also a tax on the value of the ferry-boats, which was refused, on the , ground that these boats were not property "within the city." The Supreme Court of Missouri held that the company was liable for the tax on the ferry-boats: St. Louis v. The Ferry Company, 40 Mo. 580. This decision was overruled by the Supreme Court of the United States: St. Louis v. The Ferry Company, 11 Wall.

The latter court held that a corporation is a citizen of the state which created it; that jurisdiction of either person or property is necessary to the exercise of the taxing-power, and while it is true, as a general rule, that personal property follows the person, yet this dectrine does not stand in the way of the taxing power in the locality where the property has an actual situs. The enrolment of the vessel throws little light upon the question of actual situe, because she is required to be registered at her home port, and where her home port is depends upon the locality of the owner's residence, and not upon the place of enrolment. SWAYNE, J.: "The ewner was, in the eye of the law, a citizen of Illinois, and from the inherent law of its nature could not emigrate or become a citizen elsewhere. As the boats were laid up on the Illinois shore, when not in use, and the pilots and engineers who ran them lived there, that locality, under the circumstanees, must be taken to be their home port. They did not so abide within the city of Et. Louis as to become incorporated with and form part of its personal property. House they were beyond the jurisdiction of the authorities by which the taxes were assessed, and the validity of the taxes connet be maintained."

8. Goods in hands of Consigner, or in Transitu. - Where goods are sent from one state to another merely for sale, the rule that personal property follows the person is not so far modified by their actual situs as to make them liable to taxation in the hands of the consigned: The Parker Mills v. The Commissioners of Taxes, 28 N. Y. 242, 245; McCormick v. Fitch, 14 Minn. 252; People v. Coleman, 4 Cal. 46.1 The case of The Parker Mills announces the principle laid down, but it arose upon the construction of a statute, requiring "all persons and associations doing business in the state of New York, as merchants, bankers or otherwise, either as principal or partners, whether special or otherwise, and not recidents of the state, to be assessed and taxed on all sums invested in any manner in said business, the same as if they were residents of the state." The Parker Mills was a foreign corporation, manufacturing nails in the states of Massachusetts and Rhode Island. It had a depot and agent in the city of New York, to whom it transmitted mails for sale. Its only business within the state consisted in making such sales, the proceeds of which were remitted at once to the corporation in Mastachusetts; and where sales were upon credit, the securities received were sent to the corporation for collection. Annual rales, \$800,000; value of nails in store on day of assessment, \$10,000. It is said by the court that the object of this statute was to reach foreign corporations and persons ongaged as partners of commercial or other firms, who resided in New Jersey or Connecticut, enjoyed the fruits of a profitable business carried on in New York, and yet, by reason of the rule that personal property is deemed to follow the person, they escaped taxation in New York. In these the investment of the funds has more or less of permanency. It is not the mere transit of proparty through the state for the purposes of a market. The court likens the case to that of a drover, who transports his herds of eattle to New York for sale, who may have his field or yard for keeping his cattle and his herdsman to take care of them. It is easy to perceive the difference between the case of the drover put, and that of the merchants doing business in New York, as to their permanency; but the difference between a merchant engaged in a

¹ See also North v. Fogetteville, 1 Winston's (N. C.), Replix 10; Frink's Appeal, 92 Forms. St. 207; Door v. Smill, 4 Blotch. C. C. 208, as to insing business in one state when a person section in another; also 19 Wall. 202-2, approving principle of Now York statute quotal.

regular business and that of The Parker Mills Company, as to permanency, it is hard to perceive. But I do not understand the court as deciding that a statute taxing the property of a company carrying on such a business as The Parker Mills Company, would be void, because the situs of the property was not sufficiently permanent to make it property within the jurisdiction of the state, and to modify the rule that personal property follows the person; that would be to overrule Hoyt v. The Commissioners of Taxes: 28 N. Y. 224. They merely decide that the company was not taxable under the statute named.

In Transitu.—Goods in transit to a market are not liable to taxation in the state through which they pass to arrive at a market for sale: State v. Eagle, 84 N. J. L. (5 Vroom) 425; Conley v. Chedic, 7 Nevada 386; Carrier v. Gordon, 21 Ohio 605. The case in New Jersey arose under a statute which makes "a person liable to be taxed in the township or ward in which he resides, for all personal estate in his possession or under his control as trustee, guardian, executor, administrator or agent." An assessment was made on coal lying on a pier at Elizabethport, under the control of an agent. The coal was the property of a company doing business in Pennsylvania, was mined on their land in Pennsylvania, and sent by the cars of the Central Railroad to Elizabethport, to be there shipped by water to other markets for the purposes of sale. It was the custom of the company, when the coal arrives at Elizabethport, to have it separated according to sizes, and when a cargo of one size is obtained, it is shipped to points in New England, or up the Hudson river, as soon as a vessel can be chartered. None of the coal is sold for consumption at Elizabethport. Duruz, J., delivering the opinion of the court, said: "The duties of the agents were simply to obtain and transmit orders to their principals, and superintend reshipment when delivered. The property was not in the state under such circumstances as to be liable to taxation here. The power of the state to tax subjects of commerce, where their transit for the purpose of commerce has ceased, and they have become incorporated and mixed up with the mass of property in the community, is well settled. But that a tax on the property belonging to a citizen of another state, in its transit to market in other states, which is delayed in this state, not for the purposes of sale, but merely for separation and assortment, for convenience of shipment to its desti-

Secretary Contract

nation, is a tux on commerce among the states, is tee plain to require argument. It is not the mode in which the tax is imposed, nor the person against whom it is assessed, that determines whether the taxation is within the power of the state. If a tax can be levied on the quantity on the wharf within the state when the assessment is made, why not on every ton sent across the state throughout the year? A change in the mode and time of assessment is all that would be necessary to accomplish that purpose." In the Nevada case, wood cut in California, owned by a citizen of that state, thrown into Carson river, and passing D. county in Nevada to find a market in O. county in Nevada, was beld not taxable in D. county, under a statute requiring all property in the county a specified period to be taxed there, because the wood was in D. county at the period specified. In the Ohio case cited, the statute makes all tangible property in the state liable to taxation, whether owned by resident or non-resident. The property which was claimed to be exempt from taxation, because in transitu to another state, was property in Ohio, sold to a non-resident and merely awaiting the opening of navigation for its removal. It was held liable to taxation. The court say: "If the property is, at the time the tas attaches, in transitu, either through the state, or from a point in the state to one out of it, it is not within the state in the sense of the statute. Such was not the condition of this property; it had a situs when the tax attached. purchase with intent to remove cannot change it."

9. Double Taxation, or Taxation on Credits.—The equality or justice of the policy of taxing credits, is a question upon which political economists, legislators and courts differ. A commission from the legislature of New York, in their report on this subject, condemn the practice of taxing credits, while a similar commission from Connecticut and one from New Jersey hold it to be a just and equitable mode of taxation: Report of Commissioner Wells at al., 1871, to the New York Legislature, pp. 72-8. Mr. Walker, in his work, demonstrates the fairness of this system of taxation: Walker, Beience of Wealth, ed. 1872, pp. 361-2-3.

As to the mortgagee, or, in case of a sule of land on credit

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¹ Cloing Eric Railroad v. State, St N. J. L. (2 Vroces) 831, where it was decided that a transit duty of three cents on every passenger, and two cents on every ton of freight, transported by corporations through the state, was void.

without mortgage, the holder of the notes for purchase-money, it is settled in several states that the taxation of the credits is not double taxation: The People v. Rhodes, 15 Ill. 804; State v. Manchester, 1 Dutcher 581; People v. Whartenby, 88 Cal. 461; State v. Williamson, 88 N. J. L. (4 Vroom) 77. The case in California decided it was not double taxation as to the mortgagee, but the question was reserved as to the mortgagor: People v. McCrary, 84 Cal. 459, also decides the same principle. In a subsequent case it was decided that where the mortgagee paid the tax on the debt, the mortgagor cannot complain of double taxation; it does not affect him. There was an intimation that perhaps the statute, which only allows the indebtedness of a person to be deducted from the amount of solvent demands, in ascertaining the amount of personal property to be taxed, conflicted with that provision of the Constitution requiring property to be assessed at its value, inasmuch as the value of the land in the hands of the mortgagor is his interest in the land, less the debt: Lick v. Austin, 48 Cal. 590. This question was most elaborately discussed in a late case in California; the former decisions were reviewed and sustained by a divided court: Savings of Loan Society v. Austin, 46 Cal. 415. CROCKETT and NILES, JJ., thought the taxation of the property mortgaged and of the debt secured was double taxation. The Savings and Loan Society was a banking corporation, with a capital of \$500,000, which was invested in U. S. bonds. All the solvent debts due the corporation were for moneys deposited by depositors in the bank, which were loaned out at interest, to be repaid the depositors when returned by the borrowers, with interest accumulating from time to time. These loans were secured by mortgage. This corporation was assessed for solvent debts at \$7,968,740, the amount of their loans. It was claimed that the depositors had been likewise assessed and had paid taxes on the deposits. A majority of the court, while holding the opinion just stated, thought it would have been a case of double taxation, if the record had sustained the claim set up that the depositors had been assessed and paid taxes on the deposits. BELCHER, J., says: "When money is deposited in a savings bank, to be leaned out for the benefit of the depositor, if it is taxed to the depositor, and the bank has loaned out the money and is taxed upon the note and mortgage, it is double taxation. In this case it does not appear that the taxes had been paid by the depositors on any of their

deposits, and therefore the question of double taxation does not arise. It must appear that the tax has been once paid or tendered by some one." This case is cited in a later case in the same state, as deciding that solvent debts are liable to taxation: People v. Ashbury, 46 Cal. 523.

Where property is taxed in one state, on account of the residence of the decodent, and in another because the evidences of debt in the hands of the ancillary administrator is in the latter state, the fact that it will be thus subject to double taxation is not weighed at all by the courts of the latter state: St. Louis County v. Taylor's Administrator, 47 Mo. 594. Such taxation may be unjust, but the court cannot disregard the law because it has that effect: Tallman v. Butler County, 12 Iowa 584; approved in 28 Iowa 870; Toll Bridge Company v. Oebern, 85 Conn. 7. But if a certain kind of property is clearly taxable under one section of the statute, the statute will be so construed as not to make the same property taxable again under another section of the statute: Savings Bank v. Portsmouth, 53 N. II. 17.

- 10. Conclusion as to Taxable Situs of Personal Property.—We conclude that the situs of personal property for the purposes of taxation depends in a great measure upon the nature of the property.
- (a.) If it be chattels, which have a tangible existence, they are taxed in the locality in which they are situated.
- (5.) Evidences of debt, such as state stocks and bonds of municipal corporations, transferable by delivery, and indeed all negotiable instruments which are of a chattel nature, are taxable where the evidence of the debt is actually situated.
- . (c.) But chattels which are in transit from one state to another, seeking a market, or which are in the hands of a consignee for sale merely, are not subject to taxation in the state where they are actually situated, but in that of the owner.
- (d.) Debts not negotiable are taxable where the owner resides; they follow his person.
- (c.) But where it is necessary, in case of the death of the ewner, to have administration in the state of the debtor, the logal title being in the ancillary administrator or executor, the assets of the estate recoverable in the ancillary forum may be taxed by that state. But legacies, the proceeds of property situated in the dominitary forum, although passing to legatess through the hands of

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the ancillary administrator, are not taxable in the state of the ancillary forum.

- (f.) Stocks of corporations follow the person of the owner, and are taxed at the place of his residence.
- (g.) Ships are likewise taxable at the residence of the owner, which is generally that of the home port, or place of registry; although when they are in different states the residence of the owner governs.
- (A.) The rule as to debts not negotiable being taxed at the residence of the owner is modified, to the extent that where a person residing in one state, has an agent in another, who loans or invests money for him, holds the evidences of debt, and so invests the proceeds of the loans when collected in the same state, it is held then to be taxable at the residence of the agent.

W. H. B.

, Nonrole, Va.

RECENT AMERICAN DECISIONS.

Supreme Court of Errors of Connecticut.

WILLIAM W. WELCH D. THE BOSTON AND ALBANY RAILROAD COMPANY.

The defendants, a railroad company, claimed to be exempt from liability for an injury to a horse transported upon their road, by reason of a stipulation in the bill of lading that they were not to be liable for any one of certain specified injuries or eases of injury to any animal thus carried. The court charged the jury that they were still liable for any injury caused by want of ordinary care on their part. Hald, that the charge was correct.

A stipulation by a halice for hire for exemption from the consequences of his own negligence, has no validity.

There may, however, he a valid stipulation for a degree of responsibility less than that imposed by law.

Where a stipulation in such a case was open to a question as to whether it intended an exemption from all liability or only a limitation of the common-law liability, and the judge charged the jury that it was void, but that the defendants would be liable only for want of ordinary care, it was held that the defendants were not injured by the charge of the judge that the stipulation was void, even if it were not so, since he held them only to the degree of liability to which they would have been held under any construction of it.

CASE, against the defendants as common carriers, for an injury to a horse carried by them.

On the trial, it was proved that the plaintiff, at Whitesboro', New York, delivered the horse to the New York Central Railroad Com-

pany for transportation, with a card attached to his halter, marked "Dr. William W. Welch, care of Dr. Stillman, Millerton, N. Y." The railroad company received the horse and signed a bill of lading for him. The plaintiff, at the same time, by his agent, A. B. Smith, signed the following document, known as a "stock release."

"New York Central Railroad, Whiteshore' Station, Feb'y 27th 1873. Memorandum of an agreement made this day, between the New York Central Railroad Company of the first part, by their station-agent at the above-named station, and A. B. Smith, agent, of Whitesboro', of the second part: Whereas, the said New York Central Railrend Company transports live stock only at first-class rates as per tariff, excepting where they transport them at a reduced rate in consideration of the owner or shipper assuming certain risks as specified below; Now, in consideration that the said railroad company will transport for the party of the second part such live stock at the reduced rate of \$5} cents per hundred lbs., the said party of the second part does hereby agree that the party of the first part shall not under any circumstances, nor for any cause, be held liable beyond the sum of \$200 for injury to or loss of any single animal carried pursuant to this agreement, although the actual value of such animal may exceed that amount; and said party of the second part also agrees to take the risk of injuries which the animals or either of them may receive in consequence of any of them being wild, visious, unruly, weak, escaping or maining themselves or each other, or from delays, or in consequence of heat, suffication, or of bring crowded, or on account of bring injured, whether such injury shall be caused by the hurning of hay, straw or any other material used for feeding said animals, or otherwise, and for any demagn occasioned thereby, and also all risk of any loss or demage which may be sustained by reason of any delay in such transportation. And said party of the second part also agrees to examine the cars in which such animals are carried and to take all risk against accirients, injuries or demages that may happen in consequence of inscentity or defect (if any there may be) in the floor, frame or doors of the cars. " And this agreement further witnesseth, that the said party of the second part has this day delivered to said railroad company one horse to be transported to Millerton, N. Y., on the conditions show expressed. By Harlem R. B. Albany. S. Punpy, Station Agent."

It was proved that the plaintiff did not read this instrument.

There was no evidence that the railroad company made any deduction from its first-class rates as a consideration of this release, except as appears from the instrument itself, and the plaintiff claimed he paid the highest rates.

It was agreed that the regular line of transportation from Whitesboro' to Millerton was by the Central Railroad from Whitesbore' to East Albany, and thence to Chatham by the defendant's railroad, and from there to Millerton by the Harlem Railroad.

The horse was transported by the Central Railroad Company from Whitesbore' to East Albany, and there, with the card attached to his balter, and with the stock release, was delivered to the defendants, who transported the horse over their railroad from East Albany to Chatham. The defendants gave the plaintiff a bill of freight for the horse, stating the place to which he was to be transported.

When the borse arrived at Chatham he was found to have been injured. The plaintiff offered evidence to prove, and claimed that he had proved that the horse received his injuries while in the custody of the defendants for transportation, but the defendants desied this.

The court instructed the jury that the defendants were common carriers, and as such might to some extent limit their liability by special contract, but that the law did not permit common carriers to exempt themselves from the exercise of ordinary care and diligence in the discharge of their duties, and that the stock release was void as stipulating for total exemption from liability. And that if they should find that the plaintiff's horse was injured on the defendants' railroad, or while in the custody of the defendants for transportation, from the want of ordinary care and diligence on the part of the defendants, in such case the defendants would be liable, notwithstanding the release, and their verdict should be for the plaintiff. But that if they should find that the horse was not injured on the defendants' railroad, nor while in their custody for transportation, then their verdict should be for the defendants; or, if they should find that the horse was mjured while in the defendants' custody for transportation, or while being transported on their railroad, but without any want of ordinary care and diligence on their part, then in such case their verdict should be for the defendants.

The jury returned a verdict for the plaintiff, and the defendants moved for a new trial, for error in the charge of the court.

E. W. Seymour, in support of the motion.

Andrews and Hardenbergh, contra.

The opinion of the court was delivered by

Fortzz, J.—The controlling legal question, and the only important one in this case, is, what were the liabilities incurred on the part of these defendants, to this plaintiff, in the transportation of this horse? Were those liabilities such as are attached to common carriers by the common law, or were they such only as were created by special contract entered into between the parties?

The plaintiff, for certain reasons assigned by him, prayed the court to lay the special contract, set up by the defendants, out of the case; the defendants insisted that the same was a good and

valid agreement between the plaintiff and the Central Railroad Company; that the defendants were entitled to the same limitation of liabilities and duties under it, as had been stipulated for by the Central Railroad Company; and that the duties and liabilities of the defendants, in respect to the transportation of the horse, were not those by law imposed on common carriers.

The court charged the jury that the special contract insisted on by the defendants as the measure of their liability, was void, as stipulating for a total exemption from all liability.

If such was the character of this special contract, we are of opinion that the court was correct in pronouncing it void. We cannot recognise the validity of an agreement to exempt a party from all liability, where he fails to exercise ordinary care and diligence in the business in which he engages. It is revolting to the moral sense, and contrary alike to the salutary principles of law and a sound public policy, to allow a bailee for hire to stipulate for exemption from the consequences of his own carelessness and negligence.

But the defendants claim that the special contract set up by them was a limitation of their common law liability, not an exemption from all liability. That it was competent to the parties in this suit to stipulate for a diminished degree of responsibility from that imposed by law on common carriers, we have no doubt. Whether the construction put on this special contract, in the court below, was correct or not, we think the defendants have no just ground of complaint, when we look at the manner in which the case was finally put to the jury. By the charge, the liability of the defendants was for ordinary care only. The jury were told that if they should find that the plaintiff's horse was injured on the defend ants' road, or while in their custody for transportation, from want of ordinary care and diligence on their part, the defendants would be liable. But unless they should find such an injury so received on the defendants' road, or while the horse was in their custody for transportation, or if they found such injury was so received, but without any want of ordinary care and diligence on their part, then their verdict should be for the defendants.

The responsibility of the defendents was thus made no more weighty than that required by lew to be of perpetual obligation. If this special contract relieved from all liability, it was void. If it limited responsibility to the exercise of ordinary care, and so

construction can be more favorable to the defendants, the defendants have the benefit of their contract, for that was the extent of the liability to which they were subjected under the charge of the court. A bailee, without reward, is responsible for such care as a prudent man takes of his own property; in other words, for ordipary care. The defendants surely cannot complain when held to no higher degree of responsibility.

It is unnecessary to pursue this discussion. The Supreme Court of the United States, in the recent case of Railroad Co. v. Lockgreed, 17 Wallace 857, had the law bearing upon this subject The leading English and American authoriunder consideration. ties were fully examined, in a very elaborate opinion by Mr. Justice, Bradley. We coincide in the views therein expressed.

There should be no new trial.

The question decided in this case must be regarded by all, as one of paramount importance, in regard to one of the most extensive and important matters of business in the country, that of transportation in all modes. For, if carriers can make valid contracts, throwing all the evil consequences of their own negligence, and that of their employees, upon the persons and owners of things carried, there will always be found ready means of obtaining such contracts from those to be affected by them. It would, no doubt, he far better policy to extend the same rule of diligence now required in passenger-transportation, to that of goods, and to allow no qualification of it, by either notices or special contracts, But we must accept the law of carriers of goods as we find it, handed down to us from a former age, whose demands for security in transportation, led to the adoption of a rule of responsibility for carriers, which has no precise perallot to any other business, or any just foundation in reason or justice, as applied to any business at the present day. The esertation of the unreasonablences of the rule, probably has led all measur of enceptions to it, till we " state of the law there, upon the subject.

are in danger of bringing the law into even a worse condition than if the original rule, with all its stringency, had been rigidly adhered to, as the courts, at first, inclined to do.

The actual present state of opinion upon the leading question involved, is not fully stated perhaps in the foregoing case. As we understand that matter, after pretty careful and thorough examination, the English courts new hold that there is no invincible objection to allowing the carrier to stipulate with the owner or consignor of goods, for exemption from all responsibility in the transportation, as well from the negligence of themselves or their servants and employees. This is distinctly held in the very late case of Gallin v. London & N. W. Ry., 23 W. R. 308; Law Rep. 10 Q. B. 212, where the question is very corefully considered and the contract upheld, where a drover signed a stipulation to exenerate the company from all responsibility, as being both valid upon general principles, and resonable under the statute. This will be more esticiatory than any deductions we might make from an examination of the courts to allow, and to enforce the English cases, as to the present

The effect of this rule unquestionably is, to encourage laxness and indiffereuce in cerriers, in regard to all the appliances of the transportation, instuding the character and condition of the apparatus of transportation, as well as the service connected with its operation. This has led the American courts. generally, to reject all contracts against responsibility for negligence on the part of the carriers or their employees, as being against sound policy and good morals. But the New York courts have finally come to the conclusion that such contracts may be upheld, when expressed in clear and specific language, as intended to cover the negligence of the carrier and his employees, but that no general terms, however exclusive, will be held to extend so for: Magin v. Dinamore, 56 N. Y. 168; see, also, Knell v. Company, 39 M. Y. Superior Ct. 423. This rule seems even less satisfactory than the English rule. For If the parties may lawfully contract for exemptions from responsibility for the consequences of their own negligence, there can be no possible reason why such an extended rule of construction should be adopted with reference to that particular exemption. There is every tenson to suppose the carrier would intend to embrace that exemption above all others, if he might lewfully do so; and as the public are new very much at the mercy of railways and steamboate for

transportation for long distances, there is nothing improbable in supposing the owner of goods, or pearongers even, might submit to any conditions demanded. If such contracts are lawful and natural, we can conceive no reases why general terms should not be construed to explanes that particular examption from responsibility, with easylers. But te Magia v. Disessor, supre, Jourses, J., distinctly declares that, by the acttled laws of that state, a contract exempting the carrier from responsibility for loss, "from any come whatever." will not extend to lesses from the very causes enumerated in the bill of lading, when preduced by negligence of the carrier or his employees, but might be made to embrace them if specifically named. He cites many New York cases in support of the view, most of which do not extend beyond the first part of the raie declared, in regard to which there is no controversy in the American courts. Openheimer v. N. S Espress Co., in the Supresse Court of Illinois, 9 Alb. Law J. 167, not reported in Illinois Reports, is here estad to fever of the latter part of the rule; but we cannot believe it will ever obtain my very extensive acceptance. The epinion of Mr. Justice Bearings to Mellread Co. v. Lockwood, 17 Wallace 207, is the best expecition of the law upon this question we have any where found. L. P. D.

Supreme Court of Errors of Connecticut.

DAVID P. WOODRUFF .. AMEI P. PLANT.

The holder of a bank check is bound to present it within a reasonable time; otherwise the delay is at his own parti.

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Supreme Court of Errors of Connecticut.

DAVID P. WOODRUFF a. AND P. PLANT.

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being no bank in the place where he lived, asked the defendant, who had an account with a banker in a neighboring city, to take the amount of him in bank hills and give him his check therefor, and the defendant, fully understanding the shiper, took the bank hills and gave the plaintiff his check upon the henker, payable to the plaintiff's order, the defendant the same day depositing the hills with the hanker. The plaintiff at once endorsed the shock to his creditor and sont it by the next mail. It was three days before the check reached the place where the hanker resided and was presented for payment, at which time the banker had failed and payment was refund. The plaintiff having taken up the check sued the defendant thereon. Held, that the check was presented within a reasonable time in the circumstances, and that the defendant was liable.

The case could not be regarded as one of ballment.

ASSUMPSIT upon a bank check; brought to the Court of Common Pleas for Hartford county. The court made a finding of the facts and reserved the case for the advice of this court. The facts are sufficiently stated in the opinion.

A. P. Hyde and W. S. Merrill, for the plaintiff, cited, to the point that the check was presented for payment within a reasonable time: Bridgeport Bank v. Dyer, 19 Conn. 186: Daggett v. Whiting, 85 Id. 860; 1 Parsons' Notes and Bills 271; 8 Kent Com. 104, note e.; Taylor v. Wilson, 11 Metc. 44; Ames v. Merriam, 98 Mass. 294; First Nat. Bank v. Harris, 108 Id. 514; Merrison v. Bailey, 5 Ohio St. 18; Mehawk Bank v. Broderick, 18 Wend. 188; Mephens v. McNeill, 26 Barb. 652; Richford v. Ridge, 2 Campb. 587; Alexander v. Burchfield, 7 M. & G. 1061; Rebinson v. Hawaford, 9 Ad. & E., N. S. 51; Hare v. Henty, 10 Com. Bench, N. S. 64; Prideaus v. Criddle, Law Rep. 4 Queen's Bench 464.

Perkine and M. H. Holoomi, for the defendant, cited, to the point that the check was not presented in season: 2 Parsons' Notes and Bills 78, 79; Chitty on Bills 885 at seq.; Story on Bills, § 494; Byles on Bills 20; Harker v. Anderson, 21 Wend. 872; Chapman v. White, 2 Sold. 412; Smith v. Miller, 48 N. Y. 178; s. C. 52 Id. 545.

The opinion of the court was delivered by

FOSTER, J.—The parties to this suit resided in Southington, twenty-two miles from New Haven. They met together on the morning of the 24th of Murch 1878, and in the settlement of some business transactions, the defendant gave the plaintiff his check for \$40 on E. S. Scranton & Co., a banking company in New Haven.

The plaintiff then requested the defendant to give him another check for \$425, counting out to him bank bills to that amount. The reason of the request was, that the plaintiff was indebted to one Goodwin, who resided at Lime Rock, in Litchfield county, to whom he was about making a remittance, and he preferred to make it by a check rather than by bills. There was no bank at Southington. The plaintiff deposited the \$40 check that day at a bank in Moridon, where he kept his bank account, and on the next day it was presented for payment and duly paid. The defendant gave the check for \$425, as requested, taking bank bills of the plaintiff for that sum, which, with \$125 more, the defendant, on the same day, deposited with Scranton & Co., on whom the checks were drawn. The plaintiff, on the same day, enclosed the check for \$425 to his creditor, Goodwin, at Lime Rock, who received it the next day, the 25th, and immediately deposited it is the National Iron Bank of that village for collection. This bank, by the next mail after its receipt, sent it to a bank in New Haven for collection, which bank received it on the afternoon of the 26th of March, and early on the morning of the 27th, presented the same for payment, which was refused,—the banking house of Scranton & Co., having failed and closed its doors on the 26th. The check was duly protested for non-payment, and the requisite notices were given to all parties. The plaintiff paid Goodwin the amount of this check, and brings this suit to recover it from the defendant, who was the drawer.

Is the defendant liable?'

The defence is rested on two grounds. 1st. That this transaction was really a bailment. And 2d. That the delay in presenting the check discharged the drawer.

The claim that this transaction was a bailment is certainly not sustained by the finding. There was no agreement, no understanding between the parties that the defendant took the plaintiff's money to deposit the same with Scranton & Co., giving the plaintiff an order or check to enable him to receive it, and that when the defendant had done that his liability ended. Both parties doubtless had entire confidence in the pecuniary responsibility of Scranton & Co., and whether the defendant deposited with them the money he received for the check, or paid it out in his business, or kept it in his pocket, was a matter of entire indifference to the plaintiff. He probably bestowed not a thought on the subject,

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might best suit his convenience or pleasure. True, the defendant deposited it, and other money, with Scranton & Co., on the same day he received it; but he, also, on the same day, drew out \$485.

There is nothing in the case to support the claim of a bailment; in fact, that claim has not been very earnestly presend, as it manifestly could not be, in view of the finding.

We pass to the second ground of defence, the delay in presenting the check for payment. Has that delay discharged the defendant's liability?

The facts on this point have already been stated, but it should be stated in addition, for the case finds, that the plaintiff told the defendant when he took the check, that it was to be sent away. and would not reach the bank in several days. The defendant replied that the money would be there to meet it. It may also be added, though perhaps no stress should be laid upon it, that the defendant's account at this time was some \$4000 overdrawn, so far as cash deposits were concerned. There was a deposit of bonds against which the defendant was entitled to draw, and the banking company were authorized to sell the bonds, being bound to furnish others in place of them when required, the account of the defendant being made good. These bonds of the defendant were sold by the banking company, but whether before or after the check was drawn does not appear. They were not credited to the defendant till the 26th of March, the day the house stopped payment. At that time they owed the defendant \$999.25, including this check of \$425, for the whole of which sum the defendant duly filed his claim in his own name against the members of this company in bankruptcy, after the commencement of this suit. A dividend of twelve and a half cents on the dollar, on their estate, has been declared, received by the defendant, and tendered to the plaintiff, who refused to receive the same.

There can be no dispute as to the law regarding the presentment of a check for payment in order to charge the drawer in case of dishonor. The holder is bound to present it within a reasonable time, and to give notice thereof within a like reasonable time; otherwise the delay is at his own peril. Story on Prom. Notes, § 493. This rule it may be said is indefinite, but it seems impossible to make it more certain and precise. What is a reasonable time will depend upon circumstances, and will, in many cases, depend upon the time, the mode, and the place, of receiving the check, and upon the relations of the parties between whom the

question arises. Ib.; Mohawk Bank v. Broderick, 18 Wend. 188. Here three days only elapsed between the giving of the check and its presentment for payment.

The particular circumstances attending this case we consider very important. The defendant knew that the plaintiff desired this check to make a remittance; that it was not to be immediately presented for payment; and would not reach the bank for several days. The case of Daggett v. Whitney, 35 Conn. 366, is certainly an authority to show, that what the understanding of the parties was at the time that the check was drawn and delivered enters into the contract. That the time for presentment may be extended by the assent of the drawer, express or implied, is well cettled: Alexander v. Burchfield, 7 Man. & Gr. 1061. Here the time for presentment was extended by the assent of the drawer, not for a definite time, certainly, but for a reasonable time; and we are quite clear that a reasonable time had not expired when this check was presented for payment and dishonored.

We think the plaintiff is entitled to recover, and so advise the Court of Common Pleas.

There is little question in regard to the soundness of the rule laid down in the foregoing opinion, but every new illustration of the rule, by a different state of facts, is useful. A bank check is more analogous to an inland bill of exchange, payable at sight, then to any other of the familiar popurities of the old books, and like most other negatiable securities, when of comparatively recent origin, will naturally establish rules poculiar to its own uses, and with reference to the common practices of business men in regard to k. In Amer v. Merriman, 96 Mass. 294, BiqELOW, C. J., treats a check as strictly analogous to a note, or bill eccepted payable on demand, and gives no intimetion of any distinction in the two cases, in regard to the reasonable time for presentment. In Not. Book v. Hones, 106 Mass. 514, CHAPMAN, C. J., follows the former ease without comment. In strictness, checks are bille payable at sight; and, 'although the elementary treatises room to regard notes and bills accepted, pay-

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able on demand and at right, as reating upon the same grounds, as to what is resonable time for presentment: Story on Premiseery Notes, § 267 at sep., Chit. on Bills, ch. 7, pp. 808 of sep. Yet in practice, we apprehend that the bolder of a check would, ordinarity, be expected to present it for payment cooner than in the case of a bill or note payable on demand; and it seems to us not quite certain, that there is not implied the necessity for more diligence in preseating securities, payable at sight, where the presentment is required to fix the responsibility of the drawer, than there is where the obligation is fixed and no domand is necessary to perfect the cause of action; but it is governed so much by the possiler elecunstances, that no general rule can be even approximeted. In Suits v. Miller, 49 M. Y. 172, it was held that where the plaintiff accepted a check in New of a draft, he must present it the same day.

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Supreme Judicial Court of Maine. BEDER FALES D. LUTHER HEMENWAY ST AL

An unrestricted reference by rule of court of a suit pending upon a mortgage gives authority to the referee, if he finds the plaintiff entitled to recover, to determine the amount of the conditional judgment.

Where the mortgage is conditioned to be vold upon the fulfilment by the mortgages of their obligation to the mortgages for a life maintenance and other things, the referee, if he finds a breach of the continuing condition, should make up the conditional judgment in such sum as in equity and good conscience is a present equivalent for full performance, including therein prospective as well as past damages.

WRIT OF EXTRY, originally commenced by Joseph Tolman upon a mortgage conditioned for his support by the respondents, as is stated in the opinion.

- T. R. Simonton, for the defendants.
- A. P. Gould and J. E. Moore, for the plaintiff.

Barrows, J.—This case comes before us on exceptions to the report of the referee filed therein and the overruling of the defendants' objections thereto. The suit was originally commenced by Joseph Telman, and is a writ of entry upon a mortgage given to him by the respondents, conditioned to be void if they fulfilled their obligation of same date to maintain him during the term of his natural life, furnish him with certain comforts and privileges, and de certain other acts in said obligation specified.

The objections relied on in argument here are that the referee had no authority to fix the amount for which the conditional judgment should be rendered, and no power to include in such judgment any damages for the breach of the defendant's obligation, except such as had accrued prior to the commencement of the action, and especially none for the future support of the mortgages. * *

[Here the opinion discusses some points of practice in references under rule of court, which are omitted as entirely local.]

The referee included in the sum for which the conditional judgment was to be awarded, besides the expense actually incurred for the support of the mortgages up to the time of filing his report, general prespective dumages for the breach of the defendant's obligation.

Ought the judgment so to be made up in a suit upon a mortgage conditioned to be void if the mortgager fulfils an obligation to support the mortgagee during his natural life? When there is a breach of such an obligation and the mortgagee suce for possession of the mortgaged estate, shall his damages be assessed once for all, and the conditional judgment rendered for the amount, or is he entitled only to a conditional judgment for the cost of his support up to the time of the commencement of the action or the trial thereof in court?

It was held in Sibley v. Rider, 54 Maine 406, following the doctrine of Philbrook v. Burgess, 52 Maine 271, that the true measure of damages, and the sum for which conditional judgment should be rendered in a suit upon such a mertgage, "is a present equivalent for full performance; and if the parties submit without exceptions to a less sum, the judgment will nevertheless be conclusive." Batisfaction of it will operate as a complete satisfaction of the obligation and mortgage, so that no action can subsequently be maintained upon either. Hard as this may seem in a case where a party ignorant of his legal rights had had judgment in such a suit entered up for past damages only, we think a little reflection will make it clear that the centrary dectrine and practice would so completely deprive the mertgages of any effectual remedy as to work still greater injustice.

There seems to have been at one time a doubt whether mortgages of this description were subject to redemption after breach of the condition; but this court held in Bryant v. Brokins, 55 Maine 157, that they are so.

And this is doubtless right; but it is easy to see that the mortgages who, as is usual in such cases, has conveyed his whole cetate, relying upon prompt and punctual performance by the mortgager for his daily bread, would be in a sorry plight if he were forced to depend for his means of subsistence upon such credit as the right to maintain a succession of small suits for the recovery of mency actually advanced would give him.

After paying the expenses of litigation, little would remain for the support of the obligue.

On the other hand, the party who receives a conveyance of preparty upon the strength of his agreement to fernish a life maintenance to the granter, if required, when he fails to perform his contract, either to rectore the presence of what he has received or to furnish the means of making his undertaking good, has no cause of complaint. He simply abides the natural and necessary consequences of his own delinquency.

A review of the question only confirms us in the conviction that an adherence to the doctrine of Sibley v. Rider, and Philbrook v. Burgess, ubi supra, will best subserve both law and justice. It was the duty of the referee, standing as he did in the place of both judge and jury, to determine not only whether the continuing agreement of the defendants had been broken, but to ascertain what sum would be, in equity and good conscience, a present equivalent for full performance; and for such sum it would follow that a conditional judgment should be entered.

Exceptions overruled.

WALTON, DANFORTH and PETERS, JJ., concurred. VIRGIN, J., concurred in the result.

There is a very important practical, as well as legal question involved in this case, but which the court seem to regard as settled by former decisions of the court under statutory provisions. This class of contracts is very common in the country, and it scenes to us to involve questions not easy to be dealt with in many cases. A condition in a doed of land, dependant upon the perfermance of a contract for maintenance or support, in whotever form it is made, cannot be justly regarded as a mere mortgage for the security of a pecuniary obligation. The contract is unquestionably of a fiduciary and personal character, and one which courts of equity will not relieve against the forfeiture of, by any means, as matter of course. That is a matter resting in the discretion ofthe court, and dependant upon the circumstances of the particular case, unless controlled by statute. The conveyance, depending upon the continued performages of the esadition, becomes insperative upon failure, and a court of equity will not grant relief, even in the case of more non-repair of the premises, where the neglect has been wilful or long-out-

tinued: Hill v. Barday, 18 Ves. 86, where the general question is extensively discussed by Lord Chancellor Eldon. The same rule seems to have been then well established by the earlier decisions : Bracebridge v. Buckley, 2 Price 200; Eston v. Lyon, 3 Ves. 698. And still, a covenant to repair, although involving personal service, is as much susceptible of pecuniary compensation as almost any other, and we doubt not a forfeiture of this kind would ordinarily, in this country, be relieved against in equity. But a contract for maintenance and support is of a very different character. It is as strictly fiduciary and personal as any other, and has often been so held. Hence it has been held that such contracts are not assignable, as it is of their very econes that they should be performed by and between the parties to the contract: Bethlehen v. Annis, 40 N. H. 84. And where the contract was to pay a dobt of a certain amount by supporting the mortgages for a certain agreed term, it was held the mortgages could not relieve himself from the condition by paying the mency: Hankins T. Clement, 15 Mich. 518. But it seems to have been held in many of the states that, where the martgages has failed to perform the candition, equity will relieve hy decreping an equivalent in money: Wilder v Whittemers, 12 Mass. 262; Fisher, Fisher, 90 Plots, 490; Bathlehous v. Annie, rupra. And the cases cited in the principal case show that such has long been the practice in Maine. But the entiret is controlled by statute in all these states: Hilliard on Mort. 118. in note. And the sees of Austin v. Anatia, 9 Vt. 490, is elted by textwriters as haring established the same puls in that state. But the later sacce there in not adjust an unqualified right of redemption in the mortgager in this place of contracts, but, at mast, only in the discretise of the east, and where

the failure to perform the contract has not been wilful, and is reasonably succeptible of compensation in memory: Henry v. Tupper, 20 Vt. 260; Clout v. Dunkles v. 16 Vt. 470; Tracy v. Batchine, 26 Vt. 228.

We think it must be obvious to any one that if there is any class of contracts where courts of equity would be justified in helding a few band upon claims for relief from wilful and wenter ferbitares, it would surely be expected here. We have said all we desire to say in regard to the question in Marry v. Tapper, supra, where the authorities are corofully reviewed, and the same will be found its our critical of Story's My. Jus. § 1896 a, and note.

Emprense Court of Ohio.

REASIN W. SILAWILAN S. PETER VAN MEST.

Where the plaintiff, in prevenues of an agreement with the defendant, fernished the materials and constructed a parriage for the defendant, in accordance with ble arder and directions, for which a stipulated price was to be paid, and the defendant paraod to receive and pay for it when completed and toudered—Bold, that in an artism hangist for that purpose, the plaintiff is entitled to receive the contrast-gries and interpret from the time the money should have been paid.

Morion for leave to file a petition in error.

The contract between the parties was substantially as follows: Van Nest, a carriage-maker, agreed with Shawhan, on the lat of August 1871, that for seven hundred dollars he would furnish the materials and make for Shawhan a two-seated carriage in accordance with his directions, and have the same completed and ready for delivery at Van Nest's shop on the lat day of October following; in consideration of which Shawhan agreed to accept the carriage at the shop, and pay Van Nest the contract-price for it.

In his petition in the Court of Common Pleas, Van Nest set out the contract in terms, and averred that he had complied with it in all respects on his part, and that on the 1st of October 1871, he tendered the carriage to Shawhan at his shop, and requested him to account and new for it, which he refused to do. Judement was asked for the contract-price, with interest. The answer denied each and every allegation of the petition.

On the trial, the evidence established the contract and other allegations of the petition, and also showed that the plaintiff was still keeping the carriage subject to the defendant's order.

The court instructed the jury that if they found the issues for the plaintiff, they should give him a verdict for the contract-price of the carriage, with interest from the time the money should have been paid. To the charge thus given, no exceptions were taken; but Shawhan, by his counsel, requested the court to give to the jury the following special instructions:

- "1. If, in this case, the evidence shows that the defendant ordered the plaintiff to make for him a carriage, and agreed to take or receive it, when finished, at the plaintiffs shop, and to pay a reasonable price therefor, and the plaintiff did, in pursuance of such order and agreement, make such carriage of the value of seven hundred dollars, and have the same in readiness for delivery at his shop, of which the defendant had notice; and the defendant then failed, neglected, and refused to take, receive, or pay for said carriage, though requested so to do by the plaintiff, these will not authorize you to render a verdict for the plaintiff for the price or value of the carriage.
- "2. If the plaintiff has proved the making of the carriage for the defendant, and the refural of the latter to receive and pay for it, as alleged in the petition, then he can only recover for the damages or losses he has actually sustained by reason of this refusal of the defendant, which is the difference between the agreed price and the actual value."

These instructions the court refused to give, and Shawkan excepted.

The jury found for Van Nest, and gave him the contract-price of the carriage, with interest.

Shawhan moved to set aside the verdict, and for a new trial, on the ground that the court erred in refusing to give the instructions requested; which motions were overruled by the court, and he excepted; and judgment was entered on the verdict for the plaintiff.

The case was taken to the District Court, which affirmed the Shawhan now moves this court judgment of the Common Pleas. for leave to file a petition in error to reverse the judgment of the

Votrict Court.

- W. P. Noble, for plaintiff in error.—The measure of damages in a case like this, is the loss sustained by the vendor on account of the failure of the vendoe to accept and pay for the property which was the subject of the contract. If the plaintiffs theory, that the measure of damages is the price of the property, is correct, it must be because such a contract as that set forth in the petition, vests the title of the property contracted for in the defendant, and passes it from the plaintiff. But the contract set forth in the petition was merely executory, and the petition avers there was no delivery or acceptance of the goods; so no title did or could pass to the purchaser: Ormsby v. Machir & Renick, 20 Ohio St. 295; Downer v. Thompson, 2 Hill 187; Hague v. Porter, 8 Id. 141; Moody v. Brown, 84 Maine 107; 10 Bing. 512; Atkins v. Boll, 8 B. & C. 277; Benjamin on Sales 215; Allen v. Jarvie, 20 Conn. 87; Lang on Sales 476, and cases cited; Nires v. Nizen, 21 Ohio St. 114; Doolittle v. McCullock, 12 Id. 860; Sedgwick on Damages 43; 11 Am. Law Reg. N. B. 271; Jones v. Patton, 8 Ind. 107.
- G. E. Seney, for defendant in error.—The recovery should be for the contract-price. For the rule when an article is bargained and sold and not delivered, the court is referred to Swan's Treatise (9th ed.), 500; Hadly v. Pugh, Wright 554; Story on Sales, sect. 314; Sedgwick on Damages 280; Story on Contracts, sect. 845; 3 Parsons on Contracts (ed. 1873) 208, 200; 1 Parsons on Contracts (ed. 1873) 208, 200; 1 Parsons on Contracts 585; Dusten v. McAndrew, 44 N. Y. 72. For a mechanic's remedy, who makes an article to order and his customer refuses to receive it, see Bement v. Smith, 15 Wend. 498; Thompson v. Algor, 12 Metc. 428.

The opinion of the court was delivered by

GILMORE, J.—The only question to be determined in this case is: Did the sourt err in refusing to give to the jury the special instructions requested by the defendant on the trial below? The authorities cited by counsel for the parties respectively, are not in harmony with each other on this question. Some of these cited by the plaintiff in error (defendant below) show clearly that, under the pleadings and practice at common law, there could be no recovery under the common counts in assumpsit, for goods sold and delivered, or for goods bargained and sold, where no delivery sufficient to pass the title from the vendor to the vendor had been

made. And further, that in this form of action, proof of a tender of the goods by the vendor to the vendee, or leaving them with him against his remonstrance, would not constitute such a delivery as would pass the title and enable the vendor to recover. While these may be regarded as settling the rules of pleading and evidence on the trial of particular cases, and therefore not decisive of the question when raised under issues so formed as to present it freed from the technicalities of pleading, still there are other cases cited on the same side, which declare the rule to be as follows: Where an action is brought by the vendor against the vendee, for refusing to receive and pay for goods purchased, the measure of damages is the actual loss sustained by the vendor in consequence of the vendee refusing to take and pay for the goods, or, in other words the difference between the contract-price and the marketprice at the time and place of delivery. In the authorities cited by the plaintiff in error, no distinction is drawn, or attempted to he drawn, between the sale of goods and chattels already in existence, and an agreement to furnish materials and manufacture a specific article in a particular way, and according to order, which is not yet in existence; the theory being, that in neither case would the title pass, or property vest in the purchaser, until there had been an actual delivery, and that until the title had passed, the vendor's remedy was limited to the damages he had suffered by reason of the breach of the contract by the vendee, which were to be measured by the rule above stated. In this case it is not necessary to determine whether or not a distinction, resting upon principles of law, can be drawn between ordinary sales of goods in existence and on the market, and goods made to order in a particular way, in pursuance of a contract between the vendor and vendee. The case here is of the latter kind, and the question is, whether the plaintiff below was entitled to recover the contractprice of the carriage, on proving that he had furnished the materials, and made and tendered it in pursuance of the terms of the contract.

Counsel for the defendant in error (plaintiff below) has cited a number of authorities, in which the questions presented and decided areas upon facts similar to those in this case, and upon issues presenting the question in the same way; and as the conclusions we have arrived at are based upon this class of authorities, some of them may be particularly noticed.

In Bement v. Smith, 15 Wend. 498, the defendant employed the plaintiff, a carriage-maker, to build a sulky for him, for which he premised to pay \$80. The plaintiff made the sulky according to contract, and took it to the residence of the defendant, and told him he delivered it to him, and demanded payment, in pursuance of the terms of the contract. The defendant refused to receive it. Whereupon the plaintiff told him he would leave it with Mr. De Wolf, who lived near; which he did, and commenced suit. On the trial, it was proved the sulky was worth \$80, the contractprice. The court charged the jury, that the tender of the carriage was substantially a fulfilment of the contract on the part of the plaintiff, and that he was entitled to enstain his action for the price agreed upon between the parties. The defendant's councel requested the court to charge the jury that the measure of damages was not the sulky, but only the expense of taking it to the residence of the defendant, delay, lass of sale, &c. The judge declined to so charge, and reiterated the instruction that the value of the article was the measure of damages. The jury found for the plaintiff, with \$88.26 damages, being the contract-price with The charge to the jury was sustained by the Supreme Court of New York.

In Ballentine et al. v. Robinson et al., 46 Penn. St., 177, an agreement was made between the plaintiffs and defendants, whereby the plaintiffs were to provide meterials, and construct for the defendants a six-inch steam-engine, with boiler and Gifferd injector and heater, in consideration whereof the defendants were to pay plaintiffs \$585 in each on the completion thereof. The plaintiffs complied with and completed the contract in all respects on their part, but the defendants refused to pay according to contract. On the trial, the plaintiffs proved the contract, and the performance of it on their part, and that the regime was still in their heads.

The defendants' council asked the court to instruct the jury, "that the proper measure of damages in this case is the difference between the price contracted to be paid for the engine and the market-price at the time the contract was broken." The court declined to charge as requested, and instructed the jury that the measure of damages was the contract-price of the engine, with interest. There was a verdict for the plaintiff for the contract-price. The case was taken to the Supreme Court, and the error assigned was the refusal of the court to give the instructions

requested by the defendant. The Supreme Court affirmed the judgment in the case below. It will be seen that these cases are very similar, and presented the same question, and in the same manner that the question is presented in this case. Graham v. Jackson, 14 East 498, decides the point in the same way. Mr. Sedgwick, in his work on Damages, side page 280, in speaking on this subject, says: "Where a vendee is sued for non-performance of the contract on his part, in not paying the contract-price, if the greds have been delivered, the measure of damages is of course the price named in the agreement; but if their possession has not been changed, it has been doubted whether the rule of damages is the price itself, or only the difference between the contract-price and the value of the article at the time fixed for its delivery. seems to be well settled in such cases that the vendor can resell them, if he sees fit, and charge the vendes with the difference . between the contract-price and that realized at the sale. Though perhaps more prudent, it is not necessary that the sale should be at auction; it is only requisite to show that the property was sold for a fair price. But if the vendor does not pursue this course, and, without reselling the goods, suce the vendoe for his breach of contract, the question arises which we have already stated, whether the vendor can recover the contract-price, or only the difference between that price and the value of the goods which remain in the vendor's hands; and the rule appears to be that the vendor can recover the contract-price in full."

In Hadly v. Gane et al., Wright (Ohio) 554, the action was "assumption a written agreement between the parties, for the defendants to take all the east the plaintiff manufactured between the 2d of June 1881, and the 1st of January 1882, to be delivered at the landing in Ohicinnati, from time to time, as the navigation of the Muskingum and Ohio should permit, and to pay forty-five cents a bushel." The plaintiff proved the agreement, and the offer to deliver to the defendants three hundred and fifty borrels of salt, which the defendants refused to receive. There was an issue in the case, as to whether the contract had been previously fulfilled and abandoned by the parties. The court (LANE, J.) charged the jury that if the centract had not been "fulfilled or abandoned, and the plaintiff tendered the salt under the contract, which was refused, he had a right to leave it for the defendants and recover the value."

The only case I have examined in which the authorities on this point are reviewed, is that of Gerden v. Nervis, 49 N. H. 876. The case is too lengthy and complicated to attempt to give an abstract of it here, but the point under consideration was involved; and although the learned judge criticises the law as laid down by Mr. Sodgwick, and even shows that the authorities he quotes in support of his position do not sustain him, for the reason pointed out, yet he says that there is a distinction between the case of Bement v. Smith and the ordinary cases of goods sold and delivered, vis., "the distinction between a contract to sell goods then in existence, and an agreement to furnish materials and manufacture an article in a particular way and according to order, which is not yet in existence." He recognizes Bement's case and others of the same class, as exceptions to the general rule which is to be applied in the sale of ordinary goods and merchandise which have a fixed market value; and in the syllabors of the case the distinction is kept up and stated as follows:

"Where the vendee refuses to receive and pay for ordinary goods, wares and merchandise, which he has contracted to purchase, the measure of damages which the vendor is entitled to recover is not ordinarily the contract-price for the goods, but the difference between the contract-price and the market-price or value of the same goods at the time when the contract was broken.

"But when an artist prepares a statue or picture of a particular person to order, or a mechanic makes a specific article in his line to order, and after a particular measure, pattern, or style, or for a particular use or purpose—when he has fully performed his part of the contract, and tendered or offered to deliver the article thas manufactured according to contract, and the vender refuses to receive and pay for the same, he may recover as damages, in an action against the yender for breach of the contract, the full contract-price of the manufactured article."

As has been said, we are not called upon now to determine whether the distinction as drawn in the clauses quoted, is sound on trinciple or not; but be that as it may, we recognise the law applicable to the case before us as being correctly stated in the laws last quoted.

Judge SWAN, in his excellent "Treaties" (10th ed. 780), in speakng of the effects of a tender upon the rights of the buyer and eller, and of the damages in such case, cays: "The general rule in relation to the rights of a seller, under a contract of sale, where he has tendered the property, and the buyer refuses to receive it, is this: The seller may leave the property at some secure place, . at or near the place where the tender ought to be and is made, and recover the contract-price; or he may keep it at the buyer's risk, using reasonable diligence to preserve it, and recover the contract-price and expenses of preserving and keeping it; or he may sell it, and recover from the buyer the difference between the contract-price and the price at which it fairly sold." The rule as thus laid down was first published in 1836, two years after the decision in Hadly's case, above referred to, which was substantielly followed by Judge SWAN in laying it down. It does not appear that either the decision or the rule as laid down has ever before been questioned in Ohio. It will be perceived that Judge Swaw lays down the rule generally as applicable to all sales of chattels in the ordinary course of trade, without intimating any such distinction as that drawn in Gordon v. Norris. We sanction and apply the rule in the determination of the particular case before us. When the plaintiff below had completed and tendered the carriage in strict performance of the contract on his part, if the defendant below had accepted it, as he agreed to do, there is no question but that he would have been liable to pay the full contract-price for it, and he cannot be permitted to place the plaintiff in a worse condition by breaking than by performing the contract according to its terms on his part. When the plaintiff had completed and tendered the carriage in full performance of the contract on his part, and the defendant refused to accept it, he had the right to keep it at the defendant's risk, using reasonable diligence to preserve it, and recover the contract-price, with interest, as damages for the breach of the contract by the defendant. Or, at his election, he could have sold the carriage for what it would have brought at a fair sale, and have recevered from the defendant the difference between the contract-price and what it sold for.

The court below did not err in refusing to give to the jury the special instructions requested by the defendant below.

Motion overruled.

both so to the appropriate pleadings and contract concerning the sale of personal

The courte here taken different views, brought by the vender, in an excentery as to the measure of damages in actions—property, against the render for refusing to perform his part. Such actions parts, for which the seller may recover have been brought either upon the common counts for goods bargained and seld, goods sold and delivered, work and labor done and materials furnished. to recover the fail value or contract price, or upon special counts setting out the contract, and the breach, by the vendee, in not performing it to recover the actual demages which, in the case of sales, are measured by the difference between the contract price and the marhat raise. The propriety of proceed ing as in the first class of actions mentioned, has been frequently doubted, whereas the course pursued in the latter. has been universally approved.

The principal case lays it down as the rule in Ohio that, " the seller may leave the property, at some secure place, at or near the place where the tender ought to be made, and is made, and recover the contract price, or he may keep it at the buyer's risk, using reasonable diligence to preserve it, and recover the contract price and expenses of preserving and keeping it, or he may sell it and recover from the buyer, the differeace between the contract price and the price at which it fairly sold." The perpose of this note is to see how far the authorities bear out the first two propositions of the rule.

In Girard v. Taggart, 5 S. & R. 19, which was a special action on the case to recover the difference between the price received on a re-sale, and the contract price of ten perchased from the plaintiff, and which the defendant refixed to receive, Ginson, J., said: "Properly speaking, the seller cannot recover the price, when he has retained the goods in consequence of the buyer's refusal to comply with any part of the contract: he recovers demages for the breach of a contract which was entirely executory when it was broken, and the breach having put an and to overy idea of further performance by either party, is a violation of the contract in all in

whatever damages he can prove he has sustained. **

The English courts, and those of our own states that have followed them. maintain that no action tan be brought for goods bargained and sold, or sold and delivered, unless the property in them has actually passed to the render, and this, they hold, connet be the core to long as there is something left for the vender to do, as to weigh, or select from a larger lot, or to deliver. While these things remain undone, the goods taight be taken in execution for the vender's debts, or pass to bis assigness is bankruptcy, or he might self them to some one also; and, on the other hand, the rendee could not maintain an action of trover for them, nor would be be liable if they were burned or stelen; and for the same reasons in such a case, an action could not be supported on counts for work and labor done and materials furnished, if the materials belonged to the plaintiff. On the contrary, if the materials had been forutshed by the defendant, such action could be maintained, because the preporty in the goods would be in him, and the work and labor would be done upon his goods directly for his bouelt. When, therefore, the reades disellinus his contract before it has been entirely performed by the vender, and the proporty in the goods passed into the vendoo, those courts consider a special action in the case for damages resulting from the non-acceptance, to be the appropriate remedy.

This was the reasoning of the court in Atkinson v. Boll, 8 B. & C. 277. Assumpti for goods said and delivered, bergained and sold, work and labor done and materials furnished. The defundant employed B., a patentee, to have made for them corrain machines. B. employed the platestiff to make these under his superintendence. The defeedant refused to receive them. The

court held that none of the counts could be sustained. So, in Elliett v. Pybus, 10 Bing. \$12, defendant ordered the plaintiff to make him a machine, without any agreement as to price. He paid money on account when he saw it complete, and requested the maker to send st home. When the machine was tenderect, the defendant refused to pay the price saked and the maker declined to deliver it except for the full amount. Subsequently, the defendant said he would endeaver to raise the money if they would give him time. The court were of opinion that the only matter in dispute being the price, and the defendant bering finally acquiesced in it, he had thereby accepted the machine, and the property having passed into him, the action was properly pleaded. TINDAL, C. J., saul, "a count for goods hargained and sold, can only be maintained when the property in the goods has passed from the plaintiff to the defendant. * * * The plaintiff cannot sustain his action for gowle bargained and sold, unless where the defendant is in a condition to recover the goods in trover, and must sustain the loss in case of their being stolen or destroyed by fire." See, also, Clark v. Sponcer, 4 Ad. & E. 460, and Bessell v. Kilburn, 19 Moore P. C. C. 309. In Gillette v. Hell, 2 C. & M. 385, the converse of the doctrine laid down in these cases was held true, vis. : that a rendee earnet bring trover for goods which a vender refused to deliver, unless the property in the goods, by specific appropriation, or otherwise, has passed to the vender. In Doubler v. Thompson, 2 Hill 187, which was assumpolt for goods bargained and sold and delivered, the plaintiff, sent by a earrier, two handred and sixty barrole of coment, in response to the defend-, the goods did not pass to the vendes ant's order for two hundred and fifty. and the latter refered to accept them. The court held neither count could be sustained, because as long as there remained anything for the render to do,

parcel, no property passed, and there was no sale, much less a delivery.

In Hague v. Porter, a Hill 141, the plaintiff contracted to manufacture a lot of lamps for the defendant, and during the manufacture he altered them at the direction of the latter. The plaintiff delivered them to a car-man, from whom the defendant refused to receive them, and the carman left them on the sidewalk. In an action for goods sold and delivered, the court held that the contract was executory, and that there having been no actual delivery, the counts could not be sustained.

So, in Allen v. Jervis, 20 Conn. 80. Assumpsit for work and labor done and materials farmshed. Defendant, the patentos, ordered the plaintiff to manufacture twenty patent surgical adjusters, and directed him to stop before they were completed. The court, eiting Athenson v. Bell, held that the materials being those of the plaintiff, and the work and labor having been done on his own property, the proper remedy was an action on the case to recover damages suffered from the act of the defendant, in preventing the completion of the contract, the measure of demages to be as always in such cause, the difference between the contract and market price or the price obtained on a resale, which in the particular justance of patented articles, would be the same as the contract price.

In Moody v. Dress, 84 Me. 107, counts were filed for goods sold and delivered, and materials and labor ferplobed. The plaintiff made, tendered and left against his remonstrance, at the shop of the defendant, storestype plates ordered by him. The court held neither count sustained, because the property in without an acceptance upon his part, and that he could not be said for the value unless he had the property.

The case of Gordon v. Norrie is sufficiently set out in the principal case.

ched, but introduces an exception in the case of articles to be made to order in a particular way, as portraits, statuet, clothing, &c., and that have no market value, for which it is said the measure of damages is the full contract price. But the fact that the difference between the market value and the tentract price is the full contract price makes these cases no exceptions, if the amount is recovered as demages and not as the price contracted for, Even portraits—witness that of the collector of Boggly Wallah -have some market value, and if they have none, then all that can be said is that the difference between the contract price and the market value equals the contract price.

In Ormsby v. Thacker and Revick, 20 Ohoo 301, the declaration was for a bargain and sale of eight thousand bushels of corn. The curn was to be paid for on delivery. The court held the contract to be executory, and that the delivery in the future repelled the idea of property passing to the purchaser at the date of the contract. The facts of this case are not very clearly stated, but if it were a suit for the contract price, it would seem entirely inconsistent with the principal case. See, also, in support of these views, Story on Contracts 1005; Story on Sales 314, and Smith on Contracts 331.

We will conclude by an examination of the cases relief upon by the court and the counsel for the defendant in error.

Bodly v. Gone, Wright (O.) \$54, was a Misi Prime case, and what the judge said is taken from his remarks to the jury. It is certainly not strengthened so the decision of a point of law by the fact that the jury, in Anding against the plaintiff, did not adopt any measure of demages at all. In Bonest v. Smith, 15 Wend. 400, there were special counts sating out the contract and alleging delicery, also a general count for work and labor done and goods sold. The

e hald that the tender :

the special counts, but not upon the common counts. Considered in this light, the case is not an exception to the principle that property must have passed in order to recover the price, because the court held that property had passed. Whether tender does amount to delivery might be open to doubt.

In Dustan v. McAndres, 44 N. Y. 1872, Eanna, Ch. Com., divides the proper remedies for the disappointed vendor in substantially the same way as was done in the principal case.

"1. If a may store or retain the preperty for the vendee and sue him for the entire purchase price.

"2. He may sell the property, acting as agent for this purpose, of the vendos, recover the difference between the contract price and the price obtained on such recole.

"8. He may keep the property as his own and recover the difference between the market price at the time and place of delivery and the contract price."

But the case actually decided was one of a recale within the second class of the remedies mentioned by the court, which has never been doubted. The epinion cites Sedgwick and Parsons, who certainly do confirm it in toto, but the cases shed-Lewis v. Greider, 49 Barb. 006; Pollen v. Lelloy, 00 M. Y. \$49-were also cases of recale of the goods upon the refusal of the render to accept them. Kething in either case, except one sentence occurring in the epinion of Exmert, J., gives evice to the position taken by BARLE, Com., in the first kind of the remedies, viz. t "A vendor in such a case may, if he cheese, abandon the property, treat it as the render's, and sue the latter for the price."

Thompson v. Alger, 12 Mote. 438, certainly supports the position of the pinintiff in error. It was assumptit to recover the price of one hundred, and sinher shape of each, or democrat for

The shares had been the contract. transferred to the defendant, upon the books of the company, before he had repediated the contract. The court held that this act had vested the property in him, and that, therefore, he might be saed for the price, but that if he had repudiated the contract before the transfer. the general rule as to sales would have applied, and he would have been liable to an action for the damages only. As it happened, the stock had no value at the time the contract was made, and therefore the difference between the contract price and market value was the full contract price. But, as we have stready remarked, the fact that in any case the amount recovered would be exactly the same, whichever measure of damages were employed, does not affect any prinelple of law making one measure right and the other wrong.

In Ballentine v. Robinson, 10 Wright 177, STRONG, J., regarded the property In the engine as having passed into the vendee. If this were so, then it would be to line with Atkinson v. Bell and all the cases fellowing it. " Tet where the subject of sale is a specific article, where the contract has been so for comploted as to pass the property in the article to the vender, the possession being retained only because the price is not paid, there seems to be no good reason why the vendor should not be permitted to recover the agreed value. · · · lie has parted with the property and given the fall equivalent for the stiguisted price. His right to the proporty having passed to the vendee, his right to the price would appear to be concentration. • • • The present is not strictly the case of a sale. The plaintiffs agreed to build the engine according to directions of the defendants, and to furnish the necessary materials for it. When it was completed the defendants had notice and were bound to take it ewer, and pay the contrast price, but

instead of taking and paying the price, they requested the plaintiffs to sell it. In such a case, the right of property was clearly in them on notice of the completion of the article, and the materials of which it was composed, may fairly be said to have been delivered when they were put into the engine."

In Laubach v. Laubach, 73 Penna. 302, Suarswood, J., says: "The plaintiff in error supposes that the same rule is applicable in this case as in the ordina-y case of the refusal of a vendee, before any title to the property has passed to him, to accept goods which he had previously agreed to buy. The suthorities which have been cited, abundantly show that there the measure of damages is the difference between the contract and the market price, at the time of the refusal or breach." Ballentine v. Robinson, had been cited at bar. Boe, also, Redgwick on Damages 200: Story on Contracts, & \$45; 8 Parsons on Contracts 208.

It must be admitted that Ballentine v. Robinson and Bement v. Smith, and the principal case, can only be reconciled with what appears to be the general line of the authorities, by saying that in them, tender by the vendor, or conduct amounting to an acceptance upon the part of the vender, was considered to have passed the property in the goods to the latter. In the contract upon which the principal case was brought, the plaintiffs' shop was fixed as the place of delivery, and it might be argued that the completion of the carriage, at the time and place appointed, amounted to delivery. But the unqualified position laid down in the rule that when the vendes refuses to accept the goods upon tender, the vendor may store or retain them and one for the contract price, though adopted by Sedgwick and Parsons, does not seem borne out by the authorities. H. G. W.

Supreme Court of the United States.

M. M. WELTON . THE STATE OF MISSOURL

A license tax required for the sale of goods is in effect a tax upon the goods, themselves.

A statute of Missouri which requires the payment of a Homes tax from persons who deal in the sale of goods, weres and merchandise which are not the growth, produce or manufacture of the state, by going from place to place to sell the same in the state, and requires no such Homes tax from persons selling in a similar way goods which are the growth, produce or manufacture of the state, is in conflict with the power vested in Congress to regulate commerce with foreign nations and among the several states.

That power was vested in Congress to insure uniformity of commercial regulation against discriminating state legislation. It covers property which is troopported as an article of commerce from foreign countries, or among the states, from hostile or interfering state legislation until it has mingled with and become a part of the general property of the country, and protects it even after it has entered a state from any burdens imposed by reason of its foreign origin.

The inaction of Congress in prescribing rules to govern inter-state commence to equivalent to its declaration that such commerce shall be free from any sestrictions.

In error to the Supreme Court of Missouri. The facts are stated in the opinion of the court, which was delivered by

FIELD, J.—This case involves a consideration of the validity of a statute of Missouri discriminating in favor of goods, wares and merchandise which are the growth, product or manufacture of the state, and against those which are the growth, product or manufacture of other states or countries, in the conditions upon which their sale can be made by traveiling desiers. The plaintiff in error was a dealer in sewing machines, which were manufactured outside the state of Missouri, and went from place to place in the state selling them without a license for that purpose. For this offence he was indicted and convicted in one of the circuit courts of the state, and was sentenced to pay a fine of \$50, and to be committed until the same was paid. On appeal to the Supreme Court of the state the judgment was affirmed.

The statute under which the conviction was had declares that whoever deals in the sale of goods, wares, or merchandise, except books, charts, maps and stationery, which are not the growth, product or manufacture of the state, by going from place to place to sell the same, shall be deemed a pediar; and then exacts that no person shall deal as a pediar without a license, and prescribes the

rates of charge for the licenses, those varying according to the manner in which the business is conducted, whether by the party carrying the goods himself on foot, or by the use of beasts of burden, or by carts or other land carriage, or by boats or other river vessels. Penalties are imposed for dealing without the license prescribed. No license is required for solling in a similar way—by . going from place to place in the state—goods which are the growth, product or manufacture of the state.

The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the state; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the state.

The general power of the state to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but like all other powers must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer. But if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license.

In the case of Brown v. Maryland, 12 Wheaton 425, 444, the question arcse whether an act of the legislature of Maryland requiring importers of foreign goods to pay the state a license tax before selling them in the form and condition in which they were imported, was valid and constitutional. It was contended that the tax was not imposed on the importation of foreign goods, but upon the trade and occupation of selling such goods by wholesale after they were imported. It was a tax, said the councel, mon the profession or trade of the party when that trade was carried on within the state, and was laid upon the same principle with the usual taxes upon retailers, or innkeepers, or hawkers and pedlers, or upon any other trade exercised within the state. But the court in its decision replied that it was impossible to conceal the fact that this mode of taxation was only varying the form without varying the substance, that a tax on the occupation of an importer was a tax on importation, and must add to the price of the

article and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself. Treating the extraction of the license tax from the importer as a tax on the goods imported, the court held that the act of Maryland was in conflict with the Constitution; with the clause prehibiting a state, without the consent of Congress, from laying any impost or duty on imports or exports, and with the clause investing Congress with the power to regulate commerce with foreign nations.

So, in like manner, the license tax exacted by the state of Missouri from dealers in goods which are not the product or manufacture of the state, before they can be sold from place to place within the state, must be regarded as a tax upon such goods themselves. And the question presented is, whether legislation thus discriminating against the products of other states in the conditions of their sale by a certain class of dealers is valid under the Constitution of the United States. It was contended in the state courts, and it is urged here, that this legislation violates that clause of the Constitution which declares that Congress shall have the power to regulate commerce with foreign nations and among the several states. The power to regulate conferred by that clause upon Congress, is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammeled; hew far it shall be burdened by duties and imposts, and how far it shall be prohibited.

Commerce is a term of the largest import; it comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the states may provide regulations until Congress acts with reference to them. But where the subject to which the power applies is national in its character, or of such a mature as to admit of uniformity of regulation, the power is exclusive of all state authority.

It will not be denied that that portion of commerce with foreign countries and between the states, which equaists in the transports-

tion and exchange of commodities, is of national importance and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single. controlling authority, has been frequently referred to by this court, in commenting upon the power in question. . "It was regulated," says Chief Justice MARSHALL, in delivering the opinion in Brown v. Maryland, 12 Wheaton 422, 444, "by foreign nations with a single view to their own interests, and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties, but the inability of the Federal government to enforce them became so apparent as to render that power in a great degree uscless. Those who felt the injury arising from this state of things, and those whe were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress." 12 Wheaton 446.

The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens. If at any time before it has thus become incorporated into the mass of property of the state or nation, it can be subjected to any restrictions by state legislation, the object of investing the control in Congress may be entirely defeated. If Missouri can require a license tax for the sale by travelling dealers of goods which are the growth, product or manufacture of other states or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion.

The power of the state to exact a license tax of any amount being admitted, no authority would remain in the United States or

in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one state and injurious to the interests of other states and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the states.

There is a difficulty, it is true, in all cases of this character, in drawing the line precisely where the commercial power of Congress ends and the power of the state begins. A similar difficulty was felt by this court in Brown v. Maryland, in drawing the line of distinction between the restriction upon the power of the states to lay a duty on imports and their acknowledged power to tax persons and property, but the court observed that, though the two were quite distinguishable when they did not approach each other, yet, like the intervening colors between white and black, approached so nearly as to perplex the understanding, as colors perplexed the vision in marking the distinction between them, yet that the distinction existed and must be marked as the cases arose. And the court, after observing that it might be premature to state any rule as being universal in its application, held that when the importer had so acted upon the thing imported that it had become incorporated and mixed up with the mass of property in the country, it had lost its distinctive character as an import and become subject to the taxing-power of the state, but that while remaining the property of the importer, in his warehouse in the original form and package in which it was imported, the tax upon it was plainly a duty on imports, prohibited by the Constitution.

Following the guarded language of the court in that case we observe here, as we observed there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal government ever a commodity has ceased and the power of the state has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin. The set of

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Missouri encroaches upon this power in this respect, and is, therefore, in our judgment, unconstitutional and void.

The fact that Congress has not seen fit to prescribe any specific rules to govern inter-state commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-state commerce shall be free and untrammeled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri.

The views here expressed are not only supported by the case of Brown v. Maryland, already cited, but also by the case of Woodruff v. Parkam, 8 Wallace 128, 9 Am. Law Reg. N. S. 25, and State Freight Tax, 15 Wallace 282. In the case of Woodruff v. Parkam, Mr. Justice Miller, speaking for the court, after observing with respect to the law of Alabama then under consideration, that there was no attempt to discriminate injuriously against the products of other states or the rights of their citizens, and the case was not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity, said: "But a law having such operation would, in our epinion, be an infringement of the provisions of the Constitution which relate to those subjects, and, therefore, void."

The judgment must be reversed and the cause remanded, with directions to enter a judgment reversing the judgment of the Circuit Court and directing that court to discharge the defendant.

Supreme Court of Appeals of Virginia.

FREDERICKSBURG AND POTOMAC RAILROAD CO. v. CITY OF RICHMOND.

A grant in a logislative charter of a railroad of a right to fix its terminus at a point within the limits of a municipal corporation, to be approved by the council, and the subsequent approval of the point of terminus by the council, will not be taken to constitute an irreversible contract, or to deprive the enrogation of its proper and logisl control over the use of its streets, unless such is the effect of an express grant or a necessary implication from the charter.

It is within the ordinary and implied powers of a municipal corporation to regulate the kind of vehicles and the speed at which they may be used in traversing its streets. Buch regulation is a part of the police power of the state, delegated to the municipal corporation as the custodian of its streets, and is not an exercise of emissent domain for which compensation is to be made to the parties affected.

Where the terminus of a railroad, within the limits of a municipal corporation, was under its charter submitted to the Council and approved, and subsequently the growth of the city changed the character of the street whereon the terminus was located, an ordinance prohibiting the use of steam engines upon certain portions of the street, including the point where the terminus of the railroad was located, was hold valid.

ERROR to the Circuit Court of the city of Richmond, affirming a judgment of the Police Justice of said city, imposing a fine upon the plaintiff in error for running its care, propelled by steam, upon Broad street, in violation of a city ordinance.

The ordinance was as follows:

three of an ordinance passed May 13th 1873, entitled an ordinance to regulate the use of Broad street by the Richmond, Fredericksburg and Potomos Railroad Company, be amended and re-ordained so as to read as follows: 'Sect. 8. That on and after the 1st day of January 1874, no car, engine, carriage, or other vehicle, of any kind, belonging to er used by the Richmond, Fredericksburg and Potomos Railroad Company, shall be drawn or propelled by steam upon that part of the railroad or railway track, on Broad street, east of Belvidere street, in said city. The penalty for failing to comply with this section shall be not less than one hundred, nor more than are hundred deliars for each and every effence, to be recovered before the Police Justice of the city of Richmond.'"

The plaintiff in error (the railroad company) admitted the violation of this ordinance, but contended that it was invalid, because in violation of its chartered rights.

The opinion of the court was delivered by

CHRISTIAN, J.—The legislature, by an act providing a charter for the city of Richmond, approved May 24th 1870, vected in the Council of said city, the power "To prevent the cumbering of streets, avenues, walks, public squares, lanes, alloys or bridges, in any menner whethever;" and the power "To determine and designate the route and grade of any railroad to be laid in said city, and to restrain and regulate the rate of speed of locometives, engines and care, upon the railroads within said city, and may wholly exclude said engines or care if they please, provided no contract may be thereby violated."

It is insisted by the counsel for the railroad company, that this provision of the charter of the city of Richmond cannot be executed against it, because it is excluded from its operation by the proviso, inamusely as, by its charter, it has the right by contract for ever, and under all circumstances, to run its ears by steam through the whole length of Broad street, to its depot and terminus, at the corner of Eighth and

Bread streets.

The question, therefore, we have to determine, is whether the ordinance of the City Council is void and invalid, because it is in violation

of the chartered rights of the said railroad company, and therefore violates the obligation of the contract between the state and the said railroad company, as evidenced and declared by said charter of incor-

poration.

We are, therefore, called upon to examine carefully the provisions of that act, and to determine whether the state has by an ever-continuing contract committed itself for all time to this railroad company, to run its cars propelled by steam through the heart of the capital city of the Commonwealth, and through the most important and populous street of that city, without regard to the safety, comfort and convenience of its citizens, and without regard to the general prosperity and welfare of the whole city.

The Richmond, Fredericksburg and Potomac Railroad Company was incorporated by an act of the legislature of this state, passed February

25th 1884.

This act provided that, under the direction of certain persons, therein named, books should be opened at Richmond, Fredericksburg, and other places, "for the purpose of receiving subscriptions to the amount of seven hundred thousand dollars, in shares of one hundred dollars each, to constitute a joint capital stock, for the purpose of making a railroad from some point within the corporation of Richmond, to be approved by the Common Council, to some point within the corporation of Fredericksburg, and for the purpose of extending the same, should the company hereby incorporated, at the commencement of the work, or at any time afterwards, does it advisable to do so, from its termination within the town of Fredericksburg to the Potomac river, or some creek thereof, and for providing everything convenient and necessary for the purpose of transportation on the same." Sess. Acts 1884.

The only other section of the act (which comprises thirty-eight sections) necessary to be referred to, is the twenty-fourth section, which is

as follows:

"Sect. 24. The president and directors, or a majority of them, shall have power to purchase with the funds of the said company, and place on the railroad constructed by them under this act, all machines, wagons, vehicles, carriages, and teams of any description whatsoever, which they may does necessary and proper for the purposes of transportation."

These are the two sections of the act upon which the railroad company relies to show that the ordinance of the City Council is void and invalid as to it, because they create a contract, which is perpetual, with the state, permitting them to run their engines for all time on Breed street. These two sections will be considered more particularly

presently.

The record further shows that, on the 22d of December 1834, at a meeting of the president and directors of the Richmond and Ferdericks-burg Railroad Company, the following preample and resolutions were

adopted:

"Whereas, by the act incorporating this company, it is requisite that the point at which this railroad terminates within the corporation of Richmond should be approved by the Common Council, and it appears to the board most expedient to conduct the same from the Richmond turnpike along II. street (now Broad street), to a point at or near the intersection of the said street and Eighth street, and for the present to terminate the same by suitable connections with the contemplated wave-houses and workshops of the company on lots Nos. 477, 478, purchased by them from John Heth. Therefore, be it received, that the apprehation of the City Council be requested to the above plan. Resolved, that the president cause a copy of the foregoing resolutions to be transmitted to the City Council."

In response to these resolutions of the president and directors of the Richmond, Fredericksburg and Potomeo Railroad Company, the City Council, on the 23d of Docember 1834, adopted the following presuble and resolution:

"Whereas, by a resolution of the president and directors of the Richmond, Fredericksburg and Potomac Railroad Company, submitted to the Common Council, it appears that it is deemed most expedient by the president and directors to conduct the said railroad from the Richmond turnpike along H. street, to a point at or near the intersection of said street and Eighth street, and for the present to terminate the same by suitable connections with the contemplated warehouses and workshops of the company, on lots Nov. 477, 478, purchased by them from John Heth. Resolved, that the Common Council de approve the proposed location of the said railroad, and the present termination of the same as described in the foregoing resolution, and authorize the processtion of the said work within the limit of the city, on the above location, provided that, in locating the said railroad, so injury shall be done to the water-pipes, now hid in and along said street; provided, further, that the corporation of Richmond shall not be considered as hereby parting with any power or chartered privilege not necessary to the said railroad company for constructing said railroad, and connecting the same with the depot of said company within the limits of the city.

These preceedings of the City Council, and the two sections of the set of incorporation above quoted, constitute the foundation of the claim, on the part of the railroad company, of a perpetual and irrepealable contract between the state and that company, by which, for all time and under all circumstances, they may run their cars, propelled by steam, through one of the principal and most populous streets of the capital city of the Commonwealth.

It will be conceded, that if such contract exists at all, it originated in the two sections of the act of incorporation and proceedings theremoder above quoted. These, therefore, require a careful and candid consideration.

It is apparent that, by the first section of the act incorporating the railroad company, the logiciature delegated to the City Council of Richmond the power to select the terminal point within the corporate limits of the city; and under this act the railroad company could only locate its terminus at such point within the city of Richmond as should be approved by the City Council.

This plain construction of the first section is recognised and acted upon by the president and directors of the railroad company, when they desiare, in the resolutions adopted by them, and sent to the City Conseil, that "it is requisite that the point at which the railroad terminates within the corporation of Richmond should be approved by the City Conneil."

the president and directors of the Richmond, Fredericksburg and Potemus Railroad Company, adopted it (the intersection of Eighth and Broad streets) as the (then) "present termination of the same," and upon the express condition "that the corporation of Richmond shall not be considered as hereby parting with any power or chartered privilege not necessary to the railroad company for constructing said railroad, and connecting the same with the depot of said company, within the limits of the city."

Upon this construction of the first section, and with these plainly expressed conditions, asserting in emphatic terms the chartered powers and privileges of the corporation of the city of Richmond, the railroad company adopted the corner of Eighth and Broad streets as the terminal point within the city of Richmond, from which they should build their

read; and on which they built their depot and warehouses, &c.

In the resolutions approving the terminal point (without which approval the railroad company could not have commenced their work beginning within the corporation of Richmond) we find the express and positive reservation of all the chartered rights and powers of the municipality. These included an absolute and entire control over the streets of the city, excepting only the privilege to the railroad company of constructing and connecting their road with the depot on Broad street. Not a syllable is recorded about the mode or manner of transportation—whether by horse-power or steam—the entire regulation of that subject being reserved to the corporation with the rost of its chartered powers.

It is argued, however, that the twenty-fourth section of the act of incorporation above quoted, giving to the company the power " to purchase and place upon their road all machines, vehicles, &c., of any description whatsoever, which they may deem necessary and proper for the purposes of transportation," confers upon the company the authority to run lossmotives within the city limits. This reasoning is altogether inconcinsive and illogical. If the assent of the City Council had been absolute and unconditional, this view would not have been sound. It is manifest that the twenty-fourth section is a general provision extending to the whole read. The read passes through the counties of Henrice, Hanever, Caroline, and Spottsylvania. The legislature did not require these counties to give their assent to the construction of the road, because these counties have no chartered rights and privileges, and in these counties the railroad company acquired not only a right of way, but an absolute right of property in their road, and necessary property acquired in these countles, because, as empowered by their charter they condemned the lauds of individuals for their purposes, and paid them an equivalent in money; but the legislature did require the assent of the city authorities before the company could lawfully pass its boundaries. Within the limits of the city of Richmond all the right which this company acquired was the right of way over the street for transportation of passengers and freight. This right was subject to the right inherent in the municipal authorities to control the use of the streets and to pretest the safety, comfort, and general welfare of the citizens of the munipolity. The general right, therefore, to use machines on their read, as provided in the twenty-fourth section, does not embrace the right, plast the concept of the city authorities, to use lecomotives on one of the principal and most populous streets of the city.

It is weethy of remark, that the City Council have, ever since the

approval of the terminal point in 1889, constantly ascerted their right to prohibit the introduction of steam engines into the city. In 1848, after much contention for years on the subject between the railread company and the city authorities, on motion of Mr. Wickham, one of the most distinguished citizens, as well as one of the most learned lawyers of the city, the following resolution prepared by him was adopted by the

City Council :

"Resolved, that the Council of the city of Richmond not only maintains its right to prohibit the use of locomotives within the city whenevever it shall appear expedient to do so, but in contradiction to all allegation to the contrary, they do must positively deay all responsibility to indemnify the railroad company for any such exercise of its legitimate powers. They admit no other right in this respect on the part of that company but to a favorable and indulgent consideration—a claim which, from its nature becomes less and less the longer it is favored."

Up to the present time, the City Council have repeatedly and constantly asserted their right to prohibit the use of locomotives within the city limits, which they might or might not exercise in their own discretion, according as the sufety and wolfare of the citizens should

require.

This right was as firmly maintained and confidently asserted under the general chartered powers, and the rights inherent in every municipal emporation to guard and protect the safety of the citizens, and to regulate the use of the streets of the city, from the very inception of the construction of the railroad, as it is now when, by the smended charter above referred to, special power is conferred upon the City Council to regulate the rate of speed of locometives, engines and care upon the railroads within the city, and to wholly exclude said engines and care if they please, "provided no contract will be thereby violated."

But the railroad company confidently rely upon this provise, and it is carnestly argued that the adoption by the legislature of this provise was a recognition of the claim of the railroad company to run their locomotives on Bread street for all time. This protension is unreasonable and illogical. The only fair and legitimate inference to be drawn from the adoption of this previou is. that the legislature, aware of the controversy between the city authorities and the railroad company on this subject. left it as an open question for the courts to decide whether the chartered powers and privileges of the corporation of Richmond had been so medified and restricted by the act incorporating the Richmond, Fredericksburg and Potomac Railroad Company as to deprive the corporate sutherities of the right to prohibit the company from running steemengines on the streets of the city. This question was not intended to be decided by the legislature, but was reserved as a judicial question. The legislative declaration by the amended charter was simply that the City Council should have power to regulate the speed of locomotives, and remove them altogether, if in so doing no contract was violated; and the question as to the violation of the contract rights of the company is, by that provier, submitted to judicial determination; and that is the main question now submitted to this court.

New it must be borne in mind that when the set incorporating the Richmond, Fredericksburg and Potomes Railroad Company was persod by the legislature in 1890, the charter of the city of Richmond was then in existence, and certainly none of the provisions of that charter were repealed by the adoption of the act incorporating the railroad company, but remained in full force and effect. By the charter of the city the corporate authorities are invested with the power to "make and establish such by-laws, rules and ordinances, not contrary to the constitution or laws of the Commonwealth, as shall by them be thought necessary for the good ordering and government of such persons as shall from time to time reside within the limits of said city and corporation, or shall be concerned in interest therein." Not only were they invested with these chartered rights, specifically conferred by the terms of charter, but with all these powers and privileges which by law are laborent in every municipal corporation, to guard the safety and promote the comfort and welfare of the citizens of the corporation.

The railroad company accepted their charter, not only subject to existing laws and chartered corporate powers vested in the corporation of Richmond, but they adopted the terminal point of their road within the corporate limit approved by the City Council with the express reservation, "that the corporation of Richmond shall not be considered as parting with any power or chartered privilege not necessary to the rail-

road company for constructing the said road," &c.

It is conceded, that a charter granted to a corporation by the state may be, according to its terms, a contract between the state and corporation, the obligation of which cannot be impaired by subsequent legislation, but at the same time, while this is conceded, it is also certainly true, that corporations, like natural persons, are subject to remedial legislation and amenable to general laws. Private corporations, even without any express reservation of the powers over them by the legislature in their charters, are subject, like individuals, to be restrained, limited, and controlled in the exercise of their powers, by such laws as the legislature may pass, based upon the principles of safety to the public.

It is well settled, and cannot now be disputed, that the legislature may control the action, prescribe the functions and duties of corporations, and impose restraints upon them, to the same extent as upon natural persons, subject of course to the limitation of not impairing the obligation of contracts made between the corporation and the state.

See Redfield on Railways 428 and notes, and cases there cited.

A corporation, in the language of Chief Justice MARSHALL, in Dortmouth College v. Woodward, 4 Wheat. 518, "is the mere creature of the law; it possesses only those proporties which the charter of its creation confers upon it, either expressly or as incidental to its very existence;" and as was expressed by the same great judge, in Providence Bank v. Billings, 4 Pet. 514, "any privileges which may exempt a corporation from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist."

A cardinal rule, in the interpretation of charters of incorporation, is thus hid down by Mr. Justice GRIER, in Richmond Railway Company v. Louise Railway Company, 18 How. 71, "Public grants are to be construed strictly, and any ambiguity in the terms of the great must operate against the expectation, and in favor of the public, and the corporation can claim nothing but what is clearly given by the act."

In Charles River Bridge v. Warren Bridge, 11 Peters 545, Chief Justice Tanky, enforcing the same rule, said, "The continued existence of a government would be of no great value if, by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to privileged corporations;" and this eminent jurist enachades his discussion of the subject by the declaration, "that no claim in any way abridging the most unlimited exercise of the legislative power over persons natural or artificial can be successfully asserted except upon the basis of an express grant, in terms or by necessary implication."

Applying these rules of law and canone of interpretation to the charter of the Richmond, Fredericksburg and Potomac Railroad Company. It is clear that there is nothing in the privileges and franchines confermed by that charter which prevents the legislature, either of itself, or through a municipal corporation to which it has delegated its authority, from prescribing rules and regulations for the exercise of these privileges and franchises. And it is equally clear that the authority granted in the charter of incorporation to construct a read " from a point while the corporation of Richmond, to be approved by the City Council, to a point within the corporation of Fredericksburg," and the authority to place upon said road machines and other vehicles necessary for the gurpores of transportation, do not constitute a contract, by which the th pany may, for all time, run their engines upon Broad street, within the corporation of Richmond, and which perpetually prohibits legislative interference and control. Nor, upon the most liberal rules of interpretation, can it be said, that the charter has conferred such extracrdinary and unlimited powers upon this corporation, either "by express grant in terms or by necessary implication." Certainly there is no such express grant in the charter of incorporation. It cannot be implied from the fact that one of its terminal points is to be within the corporate limits of Richmond. The power to by its track and move its easy through one of the streets of the city does not necessarily jumply the power to move them by steam; nor does the authority to use steam engines on their read necessarily imply a perpetual grant for all time to run steam engines through the most populous streets of the city.

To give to the charter such an interpretation would be to held not only that the legislature had deliberately violated the chartered vights of the principal and capital city of the Commonwealth, by depriving it of the power to protect the public safety and promote the public welfare, but that the legislature had tied its own hands, and places this corporation above and beyond the reach of the law. Before we can reach such a conclusion we must see in the charter itself, either an express grant in terms, or one which arises from the most patent and necessary hapfication. Seeing noither, I am ferced to the conclusion that it was competent for the legislature to confer upon the City Council the power " to regulate the rate of speed of locomotives, engines and care upon the refireds within the city of Richmond, and to whelly exclude said engines if they please," and that the ordinance passed in confermity with this

Nor do I perceive that this ordinance is unreasonable and apprecive, and for that reason, as was argued by the learned counted for the phintiff in error, ought to be set saids.

This company was chartered more than forty years ago. At that time, much of what is now known as Broad street was a mere turnpike, neither graded nor paved, with, scattered here and there, houses on each side. It is now one of the most attractive and populous streets in the city; it being the most level and the widest street, and one most convenient to that part which contains the largest number of private residences. Broad street has now become the principal street, for the shops and retail business of this city. There is not only on this street a large and constantly growing resident population, but crowds are attracted to it every day, and all hours of the day, from all parts of the city, especially ladies and children, from the fact that this street has now become the great mart for supplying the wants of families, in the varied and multiform retail business necessary to meet the wants of a populous and growing city.

It is not therefore "unreasonable" that the City Council should, under this change of circumstances, prohibit the use of steam engines on

this street.

The voluminous evidence taken in this case not only shows that these locametives have had the effect to injure the business and general prosperity of this principal street, and consequently of the whole city, but it is also proved that, notwithstanding the great care and watchfulness with which this railroad has been managed, the use of steam power has

been the occasion of many fearful accidents.

And under the general police power inherent in every municipal corporation (independent of the special powers conferred by the legislature, "to regulate the rate of speed" of their engines, "or to remove them if they please") the City Council might well exercise this authority. This general police power existing in the legislature is transferred to every municipal corporation, to be exercised by it for the protection of the safety and general welfare of the citizens of such corporation; and in the exercise of such authority the municipal legislature (the City Council) must of necessity be invented with a very large discretion. See Oyden v. Sanders, 12 Wheat. 270; Forbes v. Hamburg, 2 Grant (Pa.) 291; St. Louis v. Weber, 44 Mo. 547; Commonwealth v. Robertson, 5 Cush. 442.

As was said by Mr. Justice BARBOUR, in City of New York v. Milne, 11 Peters 139, in speaking of the general police power of a state: "By virtue of this it is not only the right, but the bounden and solemn duty of a state to advance the safety, happiness and prosperity of its people, and provide for its general welfare by any and every set of legislation which it may deem to be conductive to these ends, where the power over the particular subject or the manner of its exercise is not surrendered or restrained. All those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and consequently in relation to these the authority of the state is complete, unqualified and exclusive."

This police power, says Chief Justice REDVISION, in Thorpe v. Redread Co., 27 Yerm. 149, "extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state. It must, of course, be within the range of logiciative action to define the mode and manner in which every one may so were

his own as not to injure others."

The same eminent judge and author says, in his valuable work on the Law of Railways: "There are confessedly certain cosential franchises of such corporations (railroad companies) which are not subject to legislative control; and at the same time it cannot be doubted that these artificial beings or persons, the creations of the law, are equally subject to legislative control, and in the same particulars precisely as natural persons. Railroads—so far as the regulation of their own police affecting the public safety, both as to life and property, and also the general police power of the state as to their unreasonable disturbance of and interference with, other rights, either by noise of their engines in places of public concourse, as in the streets of a city, or damage to property, either in public streets or highways-there can be no question whatever are subject to the right of legislative control:" 2 Redf. on Railw., § 232. And again, referring to the case of Buffalo and Niagara Fulls Railway v. City of Buffalo, 5 Hill (N. Y.) 100, the author says: "It has been held that a statute giving power to a Common Council of a city to regulate the running of cars within the corporate limits authorizes the adoption of an ordinance entirely prohibiting the propelling of cars by steam through any part of the city. We should entertain no doubt of the right of the municipal authorities of a city or large town to adopt such an ordinance without any special legislative especion, by virtue of the general supervision which they have over the police of their respective jurisdictions." Such must have been the opinion of the court in the case last referred to. NELSON, Chief Justice, says: "A train of cars impelled by the force of steam through a populous city may expose the inhabitants and all who resort to it, whether for business or pleasure, to unreasonable perils; so much so that, unless conducted with more than human watchfulness, the running of the ears (in that mode) may well be regarded as a public nuisance:" Id., § 250, p. 646.

In Pierce on American Railroad Law, the doctrine on this subject is thus succinctly and clearly laid down under the head of Police Laws: "A railroad company, although no power is reserved to amend or repeal its charter, is nevertheless subject, like individuals, to such police laws as the legislature may from time to time enact for the protection and safety of citizens and the general convenience and good order. These laws, although imposing liabilities and duties on the company other than those contained in its charter, or existing when it was granted, do not

impair the obligations of the contract implied therein.

"Its property and casential franchises are indeed pretented by the Constitution, but the company itself is not thereby placed above the laws. It seems not to have been the design of that instrument to disarm the states of the power to pass laws to pretent the lives, limbs, health and mornin of citizens, and to regulate their conduct towards each other. Such laws may incidentally impair the value of franchises or of rights held under contracts, but they are passed disarce intritu, and are not within the constitutional inhibition."

Without multiplying authorities on this point, I will simply refer to the following cases: Vanderbilt v. Adams, 7 Cowen 849; Cowles v. Moyer of N. Y., Cowen 885; Bahn v. Boston, 12 Pick. 194; 19 Barb. 245; 45 No. 560; 5 Hill 209.

But it is indicated by the learned and able econoci for the appoilants,

F. & P. RAILHOAD CO. s. CITY OF RICHMOUT.

rights of property without componention, and reviewly affects their

It has already been shown that, upon a fair construction of the charter of the Richmond, Fredericksburg and Peterson Railread Company, there was no contract, either express or implied, by which the state bound itself, for all time and under all circumstances, to permit the company to run its becometives through the streets of the city, and that the

endianess righted no contract rights of the empany

Door it violate any quanties franchises, and door it appropriate any property of the company? Clearly not. The ordinance door not provent the company from unking its connections with the depot on Broad attest, but only regulates the mode by which these connections are to be made. It only declares that these exenections shall not be made by m. It only says to the company that the public safety and the ganand within of the city, in the opinion of the City Conneil (who are compotent to judge of this metter, so the municipal legislature), requires now that the lessonatives shall no longer traverse this most important phrest, because it express the inhabitants to unresconsile and constant in, and noriously affects the prosperity of the whole sity. In doing this the City Council are noting within their legitionts powers. They have violated no chartered rights; they have interfered with no encotin franchine. Nor can the reitrend company claim any componenties ; for in so doing the City Council have not appropriated for the public use one dellar of the property of the company. It may be the company may, in a certain sense and to some extent, he the hour by this ordimasse; but upon well established principles they have no claim to compreaction, because there is here no oppropriation of the company's property at violation of its amountial franchises, but only a regulation of the mode a which their chartered rights and frenchises may be exercised; and the company, like natural persons, must be subject always (unless pretested by obartered rights or exectitutional jubilities) to the salutory and all-pervading maxim of the law-sie atere too at effection one factors.

The law is well established by indepetable authority and the universal amount of an onlightened jurisprudence, that every person (artificial as well as natural) holds his property subject to the limitation expressed by this maxim, succeived either by the logicisture directly or, by public corporations to which the logicisture may delegate it. Laws and ordinances relating to the sufety, comfort, bealth, accreations, good order, and general welfare of the inhabitants are comprohensively styled Police Laws or regulations. And it is well cettled, that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no previous is made for com-

possetion for cost disturbances.

They do not appropriate private property for public use, but simply regulate its use and cajeyment by the owner. If he suffere injury, it is other democra alogue injurie, or, is the theory of the low, he is comparated for it by charing in the general benefits which the regulations are intended and calculated to come. The citizen owne his property absolutely, it is true; it cannot be taken from him for any private the otherway without his concept, nor for any politic use without comparation. Still he owne it emigest to this postriction, manually, that it must

be so used as not to injure others, and that the severeign authority may, by police regulations, so direct the use of it that it shell not prove pernicious to his neighbors or to the citizens generally. These regulations
rest on another maxim—solve populi suprems cel less. This power to
restrain a private injurious use of property is very different from the
eminent domain. Under the latter componention must always be made.
But under the former, it is not a taking of private property for public
use, but a salutary restraint of a noxious use by the owner contrary to
the maxim, Sic utere two ut alienum non lades. See Dillon on Musicipal Corporations, Vol. i., pp. 209, 218, and cases there cited.

In Commonwoodth v. Alger, 7 Cush. 85, Ch. J. Buaw, in an able and exhaustive opinion, in which the police power, as contradictinguish from the right of eminent domain, is discussed and is particularly applies ble to this case, says, " We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, helds it und implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. * * * * Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reseased straints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution. may think necessary and expedient. This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use whenever the public exignery requires it, which can be done only on condition of previding a reas able compensation therefor. The power we allude to is rather the police power—the power vested in the legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws. statutes and ordinances, either with penalties or without, and not repogment to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same.

There are many cases in which such a power is exercised by all wall-ordered governments, and where its fitness is so obvious as to be recognised by all as reasonable and proper. Such are the laws to prohibit the use of wavekouses for the storage of ganpowder wear hebitations or highways, to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be severed with slate or other incombustible matter; to prohibit buildings from being used for hospitals for contagious diseases, or for the corrying on of nexions or offensive trades; to prohibit the raising of a dam, and countag stagment water to apread over meadows near inhabited villages, thereby cassing noxious exhalations injurious to health and dangerous to life. And so, upon precisely the same principle, a railroad company may be prohibited from running their ears propolled by stotus through the crowded streets of a populous city, thereby subjecting property to serious injury, and human life to constant and unreasonable perfit.

Nor does the prohibition of the nexious use of property, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner

of a warehouse in the midst of the city could store in it quantities of guapowder, he might save the expense of transportation and storage at a distant point. If a landlord could let his building for a small-nex hospital or a slaughter-house, he might obtain an increased rent. If a railroad company is permitted to run its cars through the streets of a city propelled by steam, it might be less expensive and more convenient than if the same were drawn by horses. But all these are restrained. not because the public have occasion to make the like use, or make any use of the property, or to take any beneat or profit to themselves for it, but because it would be a nozious use, contrary to the maxim, Sic efters two ut alienum non ladas. It is not an appropriation of the property to public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain. This distinction is manifest in principle, and is recognised by unquestioned authority: Commonwealth v. Alger, 7 Cush. 58; Commonwealth v. Twikeley. 11 Met. 55; Boker v. Boston, 12 Pick. 184; Wadleigh v. Gillman. 12 Ma. 408; Vanderbilt v. Adama, 7 Cowen 849; Cowles v. Mayor, de, of New York, 7 Cowen 545; 1 Dillon on Corporations, § 98, pp. 200, 210; 2 Id., § 565, and cases there eited.

I am of opinion, for the reasons given, that the ordinance complained of is within the scope and power of municipal authority; that this power has not been unreasonably or oppressively exercised; that the ordinance merely preventing the use of locomotives on the streets does not impair the obligation of any contract, nor violate the chartered rights or any essential franchise of the railroad company; and that is therefore valid and of full form and affort.

The judgment of the Uircuit Court should be affirmed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES, SUPREME COURT OF MICHIGAN. SUPREME COURT OF ORIG. SUPREME COURT OF WISCONSIN.

ACTION.

Promise to pay Debt of Another—Estopped.—In an action to recover a debt which the defendant agreed with a third party to pay the plaintiff, it is a good defence to show that before the plaintiff assented to, or acted

¹ From J. W. Wallace, Ecq., Reporter; to appear in vol. 22 of his Reports.

^{*} From Houry A. Cheney, Eq., and Hoyt Post, Eq., Reporter. Cases dechief at October Term 1675. The volume in which they will be reported enamet yet be indicated.

[&]quot; From B. L. Do Witt, Ecq., Reporter; to appear in 25 Okio State Reports.

⁴ From Hou. O. M. Comover, Reporter; to appear in 80 Wisconsia Reports.

on the promise made in his favor, the agreement had been received: Trimble v. Strother, 25 Ohio.

In such case, where the plaintiff has not been induced to alter his position by relying, in good faith, on the promise made in his faver, the defendant is not estopped from setting up any defence which he could have set up against the enforcement of the contract by the other contracting party: Id.

ADMIRALTY. See Lie Pendens.

Meritime Lien—Jurisdiction of State Courts—Home Port.—A lieu exints under the maritime law for supplies furnished to a vessel in the port of a state in which her owner does not reside: Doesell & Bouman et al. v. Goode, 25 Ohio.

A suit is rem against the vessel to enforce such lies, cannot be maintained in a state court, the exclusive jurisdiction in such case being vested in the courts of the United States: Id.

. For the purpose of ascertaining whether such lies exists, the home port of the vessel is to be determined by the residence of the ewner, and not by the place of her enrelment: Id.

Where a vessel was furnished with supplies at the port of Cincionati, the place of her eurolment, no owner residing in this state, the right to assert a maritime lien against the vessel, for such supplies, is not affected by the fact that one of the owners of the vessel resided in the adjoining city of Covington, in the state of Kentucky: Id.

Assumpert.

An action of assumpoit against parties jointly, fails if there is no evidence of a joint liability or understanding on their part: Moss v. Page, S. C. Mich.

ATTACEMENT.

Pendency of Attachment in another State.—In an action to recover money due on contract, it is a sufficient defence to show that the money cought to be recovered has been attached by process of garnishment duly issued by a court of a sister state, in an action there proceeded against the plaintiff by his creditors, although it appear that the plaintiff and such creditors are all residents of this state: Buildiners and Ohio Builtoned Ch. v. May, 25 Ohio.

ATTORNEY.

The mayor or councilman of a municipality is not bound by his official position to give to the latter his professional services as a lawyer without charge: Mayor of Nilss v. Mussy, S. C. Mich.

BAILMENT.

Denial of Ballor's Title.—One who receives property as bailes or agent cannot at law dony that his bailor or principal had title to the property at the time of its delivery to him: Nodd v. Montanye, 88 Wis.

Defendants claim to have purchased certain chattels, here in dispute, from the assignee in bankruptcy of one E., as a part of E's estate. Plaintiffs testify that they purchased said property of E. before he was adjudged a bankrupt; that some menths afterwards they lessed it to

definition to be used and taken care of, and possession to be restored to plaintiffs when they should request it; and that defendants' alleged purchase was made while they were holding the property under such bailment. Ifold, that if the facts are so found, defendants cannot claim title under their said purchase, as against the plaintiffs: Id.

BANKRUPTCY.

The withdrawal of opposition to bankruptcy proceedings already begun, is a valid consideration for an agreement between politioning creditors and the defendants in bankruptcy: Sanford v. Huzford, S. U. Mich.

BILLS AND NOTES. See Partnership.

Parel Agreement not to Negotiate—Consideration—Estoppel of Maker se against Holder.—In an action on a promissory note, evidence is inadmissible to show a parol agreement, made when the note was given, that it should not be negotiated by the payoe: Knox v. Clifford, 88 Win.

Where a note was given for an amount due the payee from the maker on a certain contract, this was a sufficient consideration, although the payee may have swed the maker at the time more than the face of the mote, on other contracts: Id.

One whe purchases negotiable paper, before maturity, without notice, in absolute payment of a pre-existing debt, surrendering his previous security, is protected by the law merchant against all equities of the maker as against the payer: Id.

One who makes and puts in circulation a negotiable note, bearing date on a secular day, is estopped, as against an innocent holder, from showing that it was executed on Sunday: Id.

Action by Drawes to recover back from Payce the amount paid by him.—After accepting and paying a bill, the drawes cannot recover back the amount of it from the payce on the ground that he had paid it under a mistake as to the reliability of the drawer's security, which had proved to be fictitious: National Bank v. Burkham, S. C. Mich.

CONSTITUTIONAL LAW. See Hawkers and Pedlers.

Delegation of Legislative Power—Conditional Enactments.—Sect. 8 of ch. 67, Laws of 1871, provides that the owner or keeper of any dog which shall have worried, maimed or killed any cattle, horses, sheep or lambs, or injured any person, shall be liable to the owner or legal possessor of such cattle, itc., or to the person injured, "without proving notice to such owner or keeper, or knowledge by him, that the dog was mischievous or disposed to kill or worry sheep." Held, that this section was inserted in the act in furtherance of its general objects ("to protect and encourage the raising of sheep and discourage the raising of dogs"); and the power given in terms by sect. 9 of the act to county boards of supervisors, to exempt their respective counties from the act, was intended to apply to said sect. 8, in the same manner as to the other provisions of the act: Slinger v. Hememon, 88 Wis.

The legislative power, rested by the Constitution in the Senate and Assembly, cannot be delegated to any other body; although, in matters garely local and municipal, the legislature may const conditional laws,

and permit the people or proper municipal authorities to decide whether such laws shall have force in their respective municipalities: Id.

Sect. 8 of the act of 1871, above recited, does not relate to municipal affairs; and the provisions of sect. 9 which in terms empower county burds to exempt their respective counties from its operation, are soid:

Id.

It appearing probable from the history of the legislation of this state upon the subject, that the legislature would not have enacted seat. I unconditionally (or without some such provision as that found in sect. I), that section cannot be upheld as valid, after seat. I have been adjudged void: Id.

Military Courts for Trial of Civil Lieues during the War.—The Constitution did not prohibit the creation by military authority of courts for the trial of civil causes during the civil war in conquered portions of the insurgent states. The establishment of such courts was the exercise of the ordinary rights of conquest: Mechanics' and Traders' Bank v. Union Bank, 23 Wall.

A court established by proclamation of the commanding general in New Orleans, on the 1st of May 1862, on the occupation of the city by the government forces, though in the order establishing it called a Provost Court, and which tried civil cases, must be presumed to have been established by the general establishing it with jurisdiction to try such cases; and in the absence of proof to the contrary it will be presumed that he acted by the consent and authorization of the President: M.

Whether such court acted within its invisdiction in a case where one bank of the state of Louisiana was claiming from another bank of the same state a large sum of money, is not a question for this court to determine, but a question exclusively for the state tribunals.

CONTRACT.

Executory—Judgment—What amounts to a collection in Equity.—In 1859 A. leut to B., who was largely interested in an emberrassed railroad, \$5000 to buy certain judgments against the read, and B. having bought, in 1850 and the early part of 1860, judgments to the amount of \$31,000, assigned the whole of them to A. absolutely. Subsequently, that is to say in August, 1860, A. made a transfer (so called) of them to B., "upon B.'s payment of \$5000, with interest from this date;" and gave to B. a power of attorney of the same date, authorising him "for me and in my name" to dispose of them as he might see proper. Held, 1st. That the so-called transfer was executory, amounting only to an offer that if B. would pay the \$5000, B. should become owner of the judgments; and that B. having, in May, 1861, gone south and joined the rebels there, and not come back till 1865, could not in 1868 Sie a bill, and on an allegation that A. had collected the judgments, claim the preceeds, less the \$5000 and interest: French v. Hay, 22 Wall.

2. That a bill making such an allegation and such a claim was demurrable; the bill not being one of discovery, and the complement having

complete remedy at law: Id.

8. That the road having been sold under a mortgage existing poier to the judgments and bought by A., who, under the laws of the state where it was, organized a new company and issued new stock, and having got, as an allotment to him, a quantity of such stock which he sold for more than enough to pay the judgments—on which satisfaction was then entered—such satisfaction was not in any sense a collection of the

judgments: Id.

4. That if it could be so considered, yet that the sale to A. having been judicially declared void, and set saide, and the old company thus brought again into existence, and B. so reinstated in his old ownership of his stock in it, unimpaired by the sale, he could claim no proceeds of the judgments from A., because, if they were ever his (B.'s) by virtue of the transfer and power of attorney, they remained his still, since no one but the owner could enter satisfaction on them.

COURTS. See Removal of Courts, United States Courts.

CRIMINAL LAW.

Verdict without Plea—Amendment.—The rule that a verdict in a criminal case, where there has been neither arraignment nor plea, is a nullity, and no judgment can be rendered upon it: Douglass v. The State, 3 Wis. 820, applies to a criminal prosecution for an amount and bettery: Davis v. The State, 38 Wis.

After a verdict in a criminal case, the court cannot order a plea of "not guilty" to be entered for the defendant, without his concent, and

then render judgment against him upon the verdict: Id.

Dog.

Liability of Owner.—At the common law the owner of a dog is not liable for damages resulting from the vicious or mischievous act of the animal, notes he had knowledge of its mischievous or vicious propossities: Slinger v. Hennaman, 38 Wis.

KAREMENTS.

By necessity—Adverse Exclusion by one Party gives option to other to treat a Common Way as extinguished.—In every deed of a part of the grantor's land, without express provision on the subject, there is an implied grant, or reservation, of ensuments of necessity for the enjoyment of the part conveyed, or of the part retained: Dillman v. Ilofman, 58 Wie.

Whether, where the owner of a permanent building envoys part of the same, dependent, for access to its upper stories, on common stairs, passages and balls, the doctrine of executes in ways of necessity applies, or whether the conveyance of a part determines the common use of such stairs, passages and halls, is not here decided: [//.

If an ensement exists in such a case, common stairs, paranges and halls which are in part upon the estate of each party, constitute together one entirely mutual ensement, and neither party can insist upon such an ensement in the estate of the other, and at the same time obstruct the

encoment in invitum on his own estate: Id

In such a case, an adverse permanent exclusion of one party by the other upon the estate of the latter, will, at the election of the former, operate as an extinguishment of the mutual ensement by the latter: Id.

A permanent business block, of several stories, in a city, was so built that the only access to the stories above the ground finer was by certain stairways and passages and a hall; and the north one-third and south

held in severalty by the parties to this action, the line of division being within said hall and one of said stairways. Plaintiff's grantor, while seized of the north one-third, several years before this action was brought, built, without defendant's consent, a permanent partition, ever since maintained, enclosing within his own premises a great part of the common hall and passages in the upper stories upon his own estate, and removed a stairway between the second and third stories, part of the common way, from his own premises to those of defendants, leaving a common way, but not the same, nor one so advantageous to the defendant. The action being to restrain defendant from obstructing the stairways and hall by building a partition wall on the line of division between the two estates: Ilrich, that the mutual ensement, if there was one, has been extinguished by plaintiff's obstruction thereof, new ratified by defendant: Id.

Equitt. See Contract.

Objection to Jurisdiction—Wairer of,—The objection that a case is one of legal instead of equitable cognishance, may be considered waived if not taken in the court of original jurisdiction: Wallace v. Harris, S. C. Mich.

Where there is apparently as good ground for assigning a case to the jurisdiction of a court of equity as to that of a court of law, it is held not to be a matter of great consequence in which branch it falls, especially in Michigan, where the same judge sits in both law and equity: Id.

ESTOPPEL. Boo Action.

FENCES.

Railroad—Suiden Destruction by Storm.—A railroad company, though required to maintain side-fencing, is not liable for the destruction of cattle suddenly let loose upon the track through a breach in the fencing caused by a storm, and not existing long enough to establish negligence of the company: Robinson v. Grand Trank Builway, S. C. Mich.

FORMER ADJUDICATION.

Estopped by—Distinct Controversics on the same matter.—In a lawsuit involving the title to land, the plaintiff is not estopped from contesting the validity of cortain forcelosure proceedings under which the title has been obtained, by his failure to raise that question in a former suit brought by him in chancery to set aside the mertgage as invalid: Benker v. Charlesworth, S. C. Mich.

One who fails to have a judgment set saids for fraud, is not debarred from contesting at law a void execution sale by not having put it in issue in his chancery suit: Id.

A complainant may, if he chooses, make distinct controversies on the same matter, the subjects of separate suits: Id.

HAWKERS AND PROCESS.

License—Constitutional Law—Police Pewer of the State.—Sect. 7, ch. 72, Laws of 1870, is connection with sect. 1, must be construed as

found travelling "from place to place within this state for the purpose of carrying to sell or exposing to sale any goods," etc., without having obtained a license as hawker and pedler in the manner provided in the set: Morrill v. The State, 38 Wis.

It is as competent for the legislature to prohibit persons from travelling for the purpose of hawking and pedling without license, as to pro-

hibit actual sales by hawkers and pedlers without license: Id.

K. & N., residents of this state, were general agents of the Singer Manufacturing Company (a corporation of another state), for the sale in this state of sewing machines manufactured by that company; and they received the machines from the company, in parts, at Milwaukee, and there fitted the parts together, and tested the machines, the work requiring a shop, with machinery and tools, and the employment of several men; but such parts were not manufactured in this state. IIIId, that the machines cannot be regarded as "manufactured within this state," so as to come within the exception of sect. 14 of the Act of 1870: Id.

Laws restricting the business of hawkers and pedlers, or providing for the licensing thereof, are an exercise of the police power of the state, and do not lose this character by requiring payment of the license fees

into the state treasury : Id.

The Act of 1870 being an exercise of the police power, that provision of the state constitution which requires uniformity of taxation is inapplicable to it. Whether, if it were an exercise of the taxing power, it would violate the constitutional rule of uniformity by reason of the exceptions created by sect. 14, is not here determined: Id.

The legislature, under the police power, might prohibit entirely the business of hawking and pedling; and the power to prohibit (where the act or business is not maken in ac) includes the power to license on such terms as the legislature may deem fit, however onerous and unequal in

Sect: Id.

There is nothing in said Act of 1870, considered as an exercise of the police power of the state, which is in violation of the Federal Constitution: Id.

HOMESTEAD.

Loss of Home and acquisition of new one—Presumptions.—Under the Homestead Exemption Law as amended in 1858 (Tay. Stats. 550, § 30), it is still only the actual home of the debter which is exempt; and the removal or absence which will not destroy the exemption is one for a temporary purpose, with the certain and abiding intention of returning, and such as is not inconsistent with the fact that the premises still remain the residence of the owner: Jarvis v. Moc., 88 Wis.

A person cannot have two homes at the same time; and such a re-

moval as gains a new home is an abandonment of the old: Id.

The presumption is that a person is at home where he is found living; but this presumption may be rebutted by showing his abode temporary, and his home elsewhere: Id.

The presumption that a person who removes with his family from one dwelling-house to another, owned by himself, does so animo manendi, may be rebutted by circumstances and conditions of the removal, or declarations accompanying it, manifesting a temporary purpose in such removal and an intention to return; but cannot be satisfactorily rebutted

by professions made only after intervening occurrences had made a return advantageous: Id.

The intention which is sufficient to rebut such presumption must be

positive and certain, not conditional or indefinite: Id.

Plaintiff removed from his former home without manifesting any intention to return to it, renting it to other persons, and moving with his family into another building owned by him in the same city, for the purpose of keeping a hotel in such building. He now claims that he did this for the purpose of establishing the hotel and keeping it until he could rent or sell it, and of then returning to his former home. He remained in the hotel eighteen months, leaving it anly when it became obvious that he could not maintain his title to it against encumbraces upon it; and his testimony tends to show that had his hotel keeping prospered, he would have continued it indefinitely, unless be could have sold or rented the property to his satisfaction. Held, that he must be regarded as having acquired a new residence, on his hotel property, abandoning his former homestead, and cannot now hold the letter premises exempt from the lien of a judgment recovered against him after his removal and before his return to them: Id.

INPANT.

Voidable Contract—Acts amounting to Ratification.—Where the defences in foreclosure were, that there was no valid consideration for the notes and mortgages in suit, and that the mortgagers were infants when the instruments were made, it appeared that the mortgage was for purchase-money of the land, and that the mortgagers were in possession, and there was no offer by them to restore the land. Iteld, 1. That these facts were conclusive evidence of a valid consideration: 2. That, treating the conveyance of the land to defendants and their execution of the notes and mortgage for the purchase-money, as one transaction, it was usedable by them, but not void; and their electing to retain passession of the land after reaching their majority, was a ratification of the whole centract, which made it binding upon them: Callie v. Day, 38 Wie.

JUDICIAL SALE.

Control of Court over.—Where a judicial sale has been unde on void process, the court may, while the purchase-money remains in the hands of the sheriff, on the application of the purchaser, set mide the sale and order the purchase-money to be refunded: Dossell v. Goods, 25 Ohio.

Lagrange. See Hawhere and Podlers.

Limitations, Statute of.

Partial Payment by one of several Debtors.—A partial payment on a joint and several prominory note, by one of several makers, will not prevent the running of the Statute of Limitations as to the other maker: Hance, Executor, v. Hair et al., 25 Ohio.

Les PENDENS.

Suit in Admirally is not.—Pendency of a suit in admirally does not bee the institution of a suit at common law on the same subject, wer extended a story of emegadiant therein. The reinfield of Common *

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Wayne Circuit Judge, 27 Mich. 405, is re-asserted: Murphy v. Granger, S. C. Mich.

. MALICIOUS PROSECUTION.

Issue of Action for—Malice—Advice of Counsel.—The true inquiry in an action for malicious prosecution is not what the actual facts were, and whether they would authorize the arrest, but what the defendants had reason to believe and did believe were the facts: Gallaway v. Burr, S. C. Mich.

In a prosecution for obtaining goods under false pretences, the plaintiff need not have actual personal knowledge of the facts, but if he honestly believes them to be true, he may rely on such statements, received through the usual channels, as business men of ordinary prudence would not upon: Id.

The institution of a criminal prosecution for the recovery of a private claim is strong, if not conclusive evidence of malice; if this is the

motive, the advice of counsel is no protection: Id.

NEGLIGENCE.

Railroad—Injury to Passengers.—Stokes v. Saltonstall, 18 Peters 181, affirmed; and on a suit for injury to persons, against a railway company entrying passengers, the doctrine again declared to be that if the passenger is in the exercise of that degree of care which may reasonably be expected from a person in his situation, and injury neutro him, this is prim4 facin evidence of the carrier's liability: Railroad Company v. Pollard, 22 Wall.

Whether a personger in a rail-car, standing up in it, when getting into the station-house, at the close of the journey, but before an actual stoppage of a car, is guilty of negligenes in the circumstances of the case, is a question of fact for the jury to decide under proper instruc-

tions: Id.

PARTNERSHIP.

Bet-of of Dobt due one Partner.—In an action on a promisecry note, made by defendants in their firm name and for a partnership debt, they cannot effect an account against plaintiff in favor of another firm, now owned by one of the defendants: Wilson v. Runkel and enother, 38 Wis.

RAILBOAD. See Penoce; Negligenes.

REMOVAL OF CAUSES.

Jurisdiction—Vacating Judgment of State Court after Removal.—A. Aled a bill against B., a purchaser of property at a sale made by C., a trustee to sell, charging both B. and C. with collusion and fraud in the sale, and praying discovery from both parties, that the sale might be set saide, &c., and that B., who had taken possession of the property, might be charged with its rests, but not making such a prayer so to C. Both B. and C. appeared and answered. The court charged B. with rests, but did not charge C. B. appealed, and the decree charging him being affirmed, and a master having reported to the inferior court the smount of rests, a final decree was there made against B. for them. At the same time that this decree was made (B. being insolvent), the complehent asked and get leave to fie an amended bill against the two parties; Mr.

D., an attorney of the court, appearing in court—but without any authority from C .- and consenting that such a bill should be filed. The amended bill was accordingly filed, alleging that B. was insolvent; that C. was chargeable for the rents as well as B., and that both were chargeable for use of certain furniture on the promises when B. entered tham. Neither B. nor C. apparently had actual knowledge of the fling of this bill; and a docree was entered, pro confesse, against U., for both the value of the rents and the injury to the furniture. On C. getting knowledge of this decree, it was vacated, and, netwithstanding opposition by him, a decree for reats was entered, leaving the case open as to both parties in respect to the furniture. M. and U. then answered me to the whole case. Bubecquently (being entitled as respected citizenship to do so) they removed the case into the Circuit Court of the United States, under the Act of March 2d 1867, which court set soids all the decrees in the state court, and ordering that the case should stand for hearing on bill, answer and pleadings, opened the entire suit as if nothing had been done anywhere else in any port of it. C. answered, donying all the material allegations of all the bills; and testimony being taken, no proof of their truth appeared as to him. The Circuit Court anauled the decrees in toto in the state court against both B. and C. and dismissed the whole bill. A. appealed to this court. Held,

1. That the decree against B. was wrongly vacated; that as to him the decree in the state court on the original bill for route was recjudicate; and that that decree stood as though no amended bill had been fled, and unimpenchable as to everything covered by it; while as to the other matter (the damage to the furniture), the Circuit Court of the United States should, by issue directed to a jury, or by reference to a master, have ascertained it and have decreed accordingly: French,

Trustee, v. Hay et al., 23 Well.

3. That the state court committed a green error in outering a decree against C. for rents, on the amended bill, where the original bill had not prayed that he should be charged with them, and that his answer denying, as it did, all the material allegations of both bills against him, and those allegations being otherwise ansupported, the decree of the state court was, as to him, rightly vacated, and the bill, as to him, rightly dismissed: Id.

When a case her been removed from a state court, into the Circuit Court of the United States, under one of the Acts of Congress relating to such removal of cases (in this case the net was that of March 2d 1867), an objection that the act has not been complied with in respect of time and other important particulars, will not be listened to in this court, the point not having been made in the court below until three years after the removal made, and when the testimony was all taken and the case ready for hearing. Nor ought it under such circumstances to have been listened to in the Circuit Court. It came too late, and must be held to have been conclusively waived: M.

Loss of Original Papers—Presumption as to Jurisdiction.—Where the Statutes of the United States authorizing a removal into the Circuit Court of the United States, of a cause brought originally in the courts of a state, require that the parties to the suit shall be citizens of different states, and where a cause has been removed from a state entit to a circuit court, and all the papers in it have been afterwards destroyed by

See, and the parties then, by writing filed in the Circuit Court, admit that the cause was brought to the Circuit Court by transfer from the state court, in accordance with the statutes in such case provided, and —being now anxious apparently only to get to trial—simply ask and get leave to file a declaration and plea as substitutes for the enes originally filed and now destroyed,—in such case this court will, in the absence of all proof to the contrary, presume that the citizenship requisite to give the Circuit Court jurisdiction was shown in some proper manner; though it be not apparent on the more pleadings: Railway Co. v. Ramsey, 22 Wall.

Jurisdiction of Federal Courts over Collateral Suits.—When in a case which is properly removed from a state court, under one of the Acts of Congress relating to removals, into the Circuit Court of the United States, a complainant getting a decree in the State Court and sending a transcript of it into another state, suce the defendant on it there, the Circuit Court into which the case is removed may enjoin the complainant from proceedings in any such or other distant court until it hears the case; and if, after hearing, it annuls the decree in the state court, and dismisses, as wanting equity, the bill on which the decree was made, may make the injunction perpetual: French, Trustee, v. Hay, 22 Wall.

STATUTE.

Construction.—In constraing a statute, the punctuation is entitled to small consideration: Morrill v. The State, 38 Wis.

United States Courts.

Jurisdiction by Consent.—Although consent of the parties to a suit cannot give jurisdiction to the courts of the United States, the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission: Railway Co. v. Ramany, 22 Wall.

USURY.

Stipulated Rate—Judgment.—Under the Act of May 4th 1869, parties may stipulate in a note for any rate of interest not exceeding 8 per cont. per annum, and such note, after maturity, without an express agreement to that effect, will continue to bear the stipulated rate until payment: Marietta Iron Works et al. v. Lottimer, 25 Ohio.

A judgment taken on such a note for the amount due, including unpaid interest, will bear the stipulated rate of interest only, without

rests, until payment: Id.

WITHESS.

Party—Deposition.—In courts of the United States under section 358 of the Revised Statutes, which enact (with a provise excepting to a certain extent, suits by or against executors, administrators or guardians) that in those courts, no witness shall be excluded in any civil action because ha is a party to or interested in the issue tried, parties to a civil suit (the suit not being one of the sort excepted by or against executors or guardians), may testify by deposition as well as erally, there being, under the Act of Congress, no difference between them and other persons having no interest in the suit: Revived Co. v. Policri, 23 Wall.

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THE RIGHT AND POWER OF EMINENT DOMAIN IN THE NATIONAL GOVERNMENT.

Its exercise wholly independent of all assistance, agency or consent of the states. Corrections on explanations of some important miscondeptions which have hitherto prevailed very extensively upon the subject. At what time compensation must be made.

THE main question, which we here propose to discuss seems to us to be one of more vital importance, and attended with more consequences essential, we might almost say fundamental, to the very existence of independent, self-acting, national sovereignty, than the mass of the people, or of the profession even, have generally regarded it.

We suppose it is now pretty generally conceded, that our national government is a complete severeignty, and that it was intended to have it possess all the powers of national sovereignty, independent of, and paramount to, all state sovereignty. We apprehend, too, that no one will now question, that the state and national sovereign ties embrace the same territorial limits, each possessing sovereign power over such territory, for the exercise of its own peculiar functions, and that such is, nevertheless, as exepletely distinct from, and independent of, the other, as any two foreign states or governments. This is very fully stated by Chief Justice Tanky, in Ablemen v. Booth, 21 How. U. S. 566, and is the pervading doctrine of all the decisions of that Court, wherever the question has arisen.

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It will, therefore, be very apparent to all, that if the nation is really left dependent upon state legislatures for the ordinary exercise of the power of eminent domain, it will form a very surprising exception to the general theory of the national government. fatal defect in the old confederation was precisely this, that it possessed no automatic functions, but was entirely dependent upon the action of the states. It was the loading, and almost exclusive purpose, of the framers of our national Constitution, to cure this very defect. It must then be very apparent to all, that if this important and indispensable power of sovereignty was still left under the exclusive control of the states, it will form a very marked and unaccountable exception to the general scope and purpose of the national Constitution. There is certainly nothing else in that instrument at all analogous to it. These considerations would surely justify any one in requiring very satisfactory evidence, that such is the necessary or natural construction of those provisions of the national Constitution, before he could fairly come to any such conclusion.

Our examination of that instrument leads to the conclusion, that there is not only no provision of that kind to be found in it, but that the contrary is expressly declared, in two of its provisions, in terms not susceptible of any other fair interpretation. In art. i., section 8, defining the powers of Congress, it is provided, that Congress shall "exercise exclusive legislation" over the territory ceded by the states for the "seat of the government of the United States, and over all places purchased by the consent of the legislature of the state * * * for the erection of forts, magasines, arsenals, dock-yards, and other needful buildings." This last clause, upon the well-known rule of construction, that a general clause following a specific enumeration, must be restricted to things cinedem generis with the specific onumeration, can only mean, "other buildings needful" for the purposes of forts, magazines, &c. The first inquiry will then be, by what sovereignty is the site of those erections to be "purchased"? It must be by the national sovereignty, since to understand that word as having reference to the states would make nonsense of the provision. And it has been well said by the Supreme Court of the United States, in numerous cases, that the national Constitution was adopted with such careful deliberation, that we may fairly regard every word as having some definite and distinct meaning. . We cannot, then, understand " pur-

chased by the consent of the legislature of the state" as meaning purchased by the states, by the consent of the states, for this would be a looseness of expression for which there is no parallel in any other portion of that instrument. It must import a purchase by the national government with the consent of the states. The difference of language, too, between this provision and that in regard to the seat of the national government, shows very clearly that the intent was not a more cession of the exclusive territorial jurisdiction. There is here to be a purchase, by the national sovereignty, of the proprietary right to the sites of "forts," &c. But what is here implied by the word "purchased"? It must naturally have the same import as in the ordinary case of purchasing land, by the sovereignty, for public purposes. It must of course embrace all the modes of such purchase, i.s., by the concent or voluntary relinquishment of the owner, and also by proceedings in invitum, for the condemnation of such land to such use, whenever that becomes necessary. For we cannot suppose that it was intended to leave the paramount national sovereignty at the mercy, or caprice, of every land-owner, as to whether it would be able to obtain the most eligible sites for its forts, and other military and naval stations. There are some public structures, where the perticular site is more essential than that of other public erections. But some may inquire why the consent of the state legislatures was required in this case? Evidently because the erections, thus provided for, of necessity would exclude the state jurisdiction. It would be inconsistent with the discipline of a fort or naval station to admit any joint jurisdiction of the states. From the very nature of the case the national authority must be exclusive of all other. But we cannot for a moment suppose that so carefully framed an instrument as the national Constitution could have used the term "consent" to a purchase by the nation, for its own use, as embracing also a purchase by the state, for the use of the nation. The things are radically distinct and different.

There are many other considerations, tending to show that this must have been the intent of this provision. The exercise of the power of eminent domain can only be effected in any case, state or national, by the action of the legislative department of the government. Neither the executive or judicial departments can act in such cases, except in conformity to legislative previsions, either general or special. The legislature must determine both the use

and the necessity, before any government can take private property. But how can the state legislatures judge of the public uses or necessities of the national government? We know it has been sometimes argued in these cases, both by counsel and courts, that the state providing for taking private property, for the use of railway and turnpike corporations, is analogous to its legislating for the condemnation of property, for the uses of the nation: Gilmer v. Lime Point, 18 Cal. 229. But these corporations are the mere instruments and dependencies of the states creating them. The uses and the necessities are those of the state, and it may as well adopt the agency of its own corporations, in carrying forward such enterprises, as to commit them to the agency of natural persons, its officers or appointees. It must of necessity act through some agency or organs, since it has no other mode of action. In Reddell v. Bryan, 14 Md. 444, the court argue, that the provision in the state Constitution, for taking property for public use, embraces the uses of the national government, since those uses are public. But public in this sense means pertaining to the same government. And no government can condemn private property for any use, which does not grow out of the duties and consequent necessities of the same government. The lexicographers define "public use" as "belonging to a state or nation:" Johnson; or, as Webster expresses it, "pertaining to a state, nation or community." It is upon this ground that the courts have held that the state legislatures cannot delegate to the municipalities, the power to foster the building up of their general commercial prosperity by means of taxation. Commercial prosperity may be, in a wide sense, of public concern, and a public benefit. But it is not a "public use," in the sense of the state Constitutions, for which private property may be condemned, either by way of taxation or of eminent domain: Allen v. Jey, 12 Am. Law Reg. N. S. 481; 60 Me. 124; Brewer v. Brewer, 18 Am. Law Reg. N. S. 785; 62 Me. 62; Weeks v. Milwaukee, 10 Wisc. 242; Lowell v. Boston, 111 Mass. 454.

It would seem not to require much argument to show that the public or governmental uses of the states are not identical with these of the nation. The governments, and, by consequence, their public uses, are as completely separate and distinct from each other as these of any two states or countries, entirely foreign to each other, can possibly be. And the owners of private property may justly demand, that the sovereignty requiring the condemnation of

such property to its public uses, shall first, by its legislative department, determine the necessity of such condemnation, for those The fact that Congress has never made any general or special legislation, to this end, will afford no presumption against the existence of the power of eminent domain in the national government. That power is an indispensable function of all autocratic governments or sovereignties. It has no connection with the source of the title to property, and is in no sense a reservation in the grant of lands or other property, for, if so, most of the new states would not possess it, since the title of the lands in those states was not derived from the states but from the United States. Nor is the fact that the states may take land from the United States, within their limits, for public uses, as was held in United States v. Railway Bridge Co., 6 McLean 517, and some other cases, any argument in favor of the states possessing the power of eminent domain, above that of the nation, as was argued by the court in Gilmer v. Lime Point, supra. In such cases the United States stand merely as proprietors, and possess no prereigntives of sovereignty in their title. If the states owned all the lands within their limits, that would not preclude the national government from taking so much of it as is required for its public uses. This power of taking the property of the other for public acces exists both in the states and the nation.

But in regard to all the public uses of the nation femorat for forts and other naval and military uses), such as custous-houses. court-houses, post-offices, &c., and for railways and canale, where there is no necessity and no right to exclude state jurisdiction, there is no provision for obtaining even the consent of the etates. It rests upon the general right of eminent domain, inherent in all complete and independent sovereigntics. And, in the 5th article. of amendment to the United States Constitution, we find the same provisions upon which the right of eminent demain rests, in all the states where there is any specific provision upon the subject,. vis.: "Nor shall private property be taken for public use without just compensation." This must refer to the national government. since it has been often decided that all the provisions of the United States Constitution do refer to the national government, unless the states are specially named : Berren v. Baltimere, 7 Pet. 249; For v. Ohio, 5 How. 410. This has been decided in New Hampshire. by the highest state court: Concord Ry. v. Greeks, 17 N. H. 47;

Mt. Washington Ry., 85 Id. 184. How then can the same court possibly explain this limitation upon the exercise of the right of eminent domain, in the national Constitution, without conceding its existence in the national sovereignty, as it seems impliedly not to do in Orr v. Quimby, 54 N. H. 590, where the court held the state may condemn the land for the use of the nation. The idea of fixing a limitation upon the exercise of a power, which did not exist, no one will contend for. The court, in the case of Orr v. Quimby, supra, attempts to escape this conclusion, by saying the power of taking private property for the public uses of the nation may exist in the states, notwithstanding its sxistence in the national government. But this seems to us entirely inadmissible. If the nation possesses the power there is no necessity, and no propriety of resorting to the states for its exercise on their behalf. There is nothing analogous to such double powers for the same purpose, in any other respect. The power of the states to punish offences against the coinage or the securities of the nation, only exists so for as such offences affect the interests of the state. The states have no power to punish offences exclusively against the United This is too obvious and too well settled to justify the citation of authority. And it need not be argued how completely at the mercy of the states the idea of fixing the power of eminent domain, for national purposes, exclusively in the states, must leave the national government. It could not build a canal or improve the navigation of a river, or construct a railway, except by the action of the states. There was nothing, in our judgment, in the med theory of the national sovereignty, which ripened into the rebellion and civil war, more flagrantly abound than this. We have noticed the argument of the state courts, in favor of this view, in all the cases which we know of except that of Burt v. The Merchants' Inc. Co., 106 Mass. 856. In this case no argument is attempted. It is placed solely upon the long usage. And the Southern States might have justified most of their theories in the same way. The truth unquestionably is, that the national government has been compelled to allow many of its important national. functions, hitherto, to lie in a state of suspended enimation, and beg its way along, at the mercy of the states, in many very essential particulars, when its powers were most unquestionable. Se that, mere silence on the part of the nation does not imply acquiescence. It was merely wairing, for the present, the exercise of its just powers, in order to quiet public opinion.

We might say much more, but we fear we may already have said more than will be read. We are happy in being able to refer to one decision by an able court, supported by a very able and satisfactory opinion, where the same conclusion was reached, with that above stated, but in a somewhat different course of reasoning, but one every way eminently satisfactory to us. We refer to the opinion of Mr. Justice Cooler in Trembley v. Mumphrey, 23 Mich. 471. We should certainly not have attempted any argument upon the question had we not regarded it as being important, and as we have before said fundamental in constitutional construction, and one which has not hitherto received that consideration, either from the profession or the courts, which it is fairly entitled to demand.

II. There is one other question connected with this subject, which is one of even more importance, so far as principle is concorned, than the one we have so extensively discussed: f. c., at what time the owner of the property taken is entitled to receive the price of it. But it is most thoroughly and learnedly discussed in the dissenting opinion of Mr. Justice Don, in Orr v. Quimbe. supre, and we could add nothing valuable to what will there be found. It seems to us, that upon principle, the dissenting opinion, that the price must be paid concurrently with the taking, is well founded, and the tendency of judicial opinions in this country, is unquestionably in that direction. It has always seemed to us, that the provision in the American constitutions, requiring compensation to the owners of private property, taken for public use, was entitled to receive the natural and ordinary construction. And in ordinary cases, where there is no prevision for credit, the seller is entitled to the price, concurrently with the delivery, and is not bound to make delivery until he receives the price, or some security which he is willing to accept in lieu of the price. This may not be practicable, in cases where the damage cannot be known till after the same is defined by the actual extent of the use. But in such cases the purchaser may be required to make an adequate deposit. And we see no reason why cases, where property is purchased by the state or a municipal corporation, or by the nation, should be any exception to the rule above stated. The security for ultimate ability to make, payment may be more cample in such cases

than in that of private persons, natural or artificial. But that is not the chief objection, in this class of cases. The owner of the property is not bound to accept a right of action, and a possible lawsuit, in lies of the price. He may well say, that he is not compellable to exchange his property for a lawsuit against any the most responsible party. And a mere claim against the sovereignty is even further from payment, than one against a party liable to be impleaded in the courts. And although this objection is not applicable to municipal corporations, yet even these are proverbially reluctant to meet promptly their legal obligations. We think, therefore, that upon principle the owner of property, so compulsorily deprived of it, is fairly entitled to have the compensation ready for his acceptance, at the very time he is deprived of it, or in exceptional cases, as soon as the damage or price can be ascertained, and that in neither case is a mere right of action, however secured, to be regarded as an equivalent. It is not desirable here to examine the cases upon this point, since they are very numerous, and may all be found in the dissenting opinion of Mr. Justice Don, and in some of the elementary books, and nothing is clearer, than that no satisfactory rule upon the subject is deducible upon any adjustment of the preponderance of the decided cases. We have done what we could in that way in our work on Railways, Vol. I.; § 78, pp. 296 et seq., entitled "The time compensation is to be made." I. F. R.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Maine.

DOVER . ROBINSON ST AL.

The plea of sureties upon a collector's bond that it is not their deed, is well thaintained by proof that subsequently to its delivery and approval, and without their knowledge or consent, but with the knowledge and consent of the selectmen of the town having custody of the bond, the penal rum was changed by the principal from twenty-five handred to twenty-five thousand deliars.

Such an alteration, so made, avoids the hand as to the curoties. It expect be deemed a speliation by a stranger. The inhabitants of the town cannot maintain suit against the curoties upon a band thus viciated. The deliberate intentional permission of such an alteration, by their general financial agents, defeats their sight to recover upon such band against those not cognicant of the alteration nor taking any part therein, nor ratifying the same.

The town itself ratifies such permission by inserting in their writ a count upon the bond in its altered condition. They cannot take the chance of ranging a bracks therefrom without incurring at the same time a risk of loss.

Ox report. Debt upon the bond of Martin L. Robinson and his sureties, for the faithful performance by him of the duties of The defence was that the penal sum was collector of taxes. altered after delivery by crasing the word "beadred" and inserting "thousand," without the knowledge or concent of the If the action could be maintained against them the defendants were to be defaulted; otherwise, it was to be discontinged as to the surcties and judgment taken sgainst Robinson The bonds given by the same parties for previous years had been for \$25,000, and it was thought by the selectmen, when they approved it, that this was for the same sum. The selectmen testified that they did not assent to the change of the penalty, which was made by Robinson, when it was handed him, merely to call his attention to the mistake, and that the chairman of the board said it could not charge the suretics for more than the original amount; while Robinson swore that the chairman teld him (as he was about to scratch out the word "hundred" with his knife) to write the "thousand" over the top, if he wrote it any-He did so, simply making ink marks across the "hundred." There were two counts in the declaration, the first upon a band fac \$25,000, and the second apon one of like date and shi the penal sum of \$2500.

The justice drawing the opinion accompanied it with the following memorandum, which is recited here as showing the pussion state of facts upon which the decision is based.

"My opinion in this case is predicated upon the following view of the facts, which I believe is the only one that we can recembly take upon the testimony as reported.

I state it in advance, because I think, if any difference of epinion arises among members of the court, it will be upon the facts and not upon the law, and therefore I think they had better be discussed separately:

The bond in suit as originally executed, delivered and approved, was in the penal sum of \$2500, instead of \$25,000, which was the sum usually inserted in the collector's bond. In the full of 1972, more than two years after the bond was given, the selection illustrated this fact, and thereupon agreed to call the attention of the principal to it.

This was done by one of them in the presence of the other two, and the bond was handed to the principal, who in the presence of

all the selectmen, remarked that he could fix that, and forthwith with a pen struck out the word "hundred," and wrote the word "thousand" over it. There was but little conversation. The testimony taken together seems to establish the fact that one of the selectmen expressed the opinion that the change could not be made so as to hold the suroties beyond the sum first inserted without · their consent, and that he directed the principal to write the word "thousand" ever the word "hundred," and that neither of the other selectmen said anything, expressing neither assent nor dissent. The bond was replaced upon the town files, and the alteration did not come to the knowledge of the sureties until the next spring. After it did come to their knowledge, two of them took mortgages of the principal's property, conditioned to be void if the principal saved them harmless "from all legal liability" on this and two other bonds which they had signed as his sureties, "it being, however, expressly understood that this mortgage imposes no additional liabilities on said sureties."

The sureties have paid to the town upon the other bonds more than the estimated value of the mertgaged property. Under these circumstances, the only reasonable inference seems to be that the alteration was made with the knowledge and consent of the selectmen, and that there is no evidence of any knowledge of, or consent to, such alteration on the part of the sureties at the time it was made, or of any subsequent ratification thereof by them."

C. A. Everett, for the plaintiffs, contended that the only power given to the selectmen was to approve a sufficient bond. When they had done this they were functus officio in this respect, and could not authorise an alteration of one already taken and approved. The bond ran to the inhabitants of the town, and the selectmen were strangers to it, so that an alteration made by them would not vitiate it; d fortiers, one made by the principal, without consent of the obligees, would not have that effect.

J. Crooby and A. M. Robinson, for the defendants.

Barrows, J.—Upon the testimony here reported the question seems to be whether the inhabitants of a town can maintain an action against the sureties upon a collector's bond, originally given in the penal sum of \$2500, when said penal sum has been altered by the principal in the bond, since its delivery, with the knowledge

and consent of the selectmen of the town, from \$2500 to \$25,000, without the knowledge of the sureties, and in the absence of all proof of a subsequent ratification by them. The proposition that these facts are sufficient to sustain the sureties' plea that such altered bond is not their deed, would seem to admit of little doubt. It is not a case of spoliation by a stranger. The cases which hold, as in Small v. Danville, 51 Maine 859, and Mitchell v. Rockland, 52 Maine 118, that towns are not responsible for the wrongful acts of their officers in the performance of a public duty imposed upon them by statute, have no proper application to a case like this.

It is no legitimate consequence of the doctrine of these and similar decisions, to subject the debtors of a town to the increased liabilities which might ensue from an undetected alteration of the instruments which form the evidence of their indebtment, when such alteration is made with the permission of the Enancial agents of the town, and to hold that such tampering with written obligations entails no risk of loss when unsuccessfully attempted. town seeks here to onforce a right by virtue of a scaled instrument which was never executed in its present condition by those against whom they claim to recover on the strength of it. change, which would avoid it beyond controversy or question, if made with the consent of an individual obligee, was made by the consent of those whom the town had made its custodians. The plaintiffs claim to maintain their suit upon the bond, notwithstanding its avoidance upon the ground that the alteration was an act unauthorized by them, and one which their selectmen were not empowered by law or vote of the town to permit.

To be relieved from a liability incurred through the unautherised and unlawful act of a public officer is one thing—to enforce as a valid subsisting claim a bend which has been vitiated with the consent of those who rightfully had it in keeping on behalf of the town, is quite another. There seems to be no good reason why the principles which are laid down in Chadwick v. Eastman, 58 Maine 12, and Lee v. Starbird, 55 Maine 491, touching the alteration of written instruments offered in evidence, should not be held to apply to a case like the present. It is not a case of minappropriation of payments, like that of Perter v. Stanley, 47 Maine 515, nor of negligence and mistake on the part of the calcument like that of Parmineter v. Stanley 50 Maine 472.

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where the defendants were rightly held chargeable for the default of their principal, although they might have been relieved if the mistakes made by the town officers could have been allowed to pass uncorrected.

A careful examination will show that there is little analogy between those cases and the one now before us.

To sustain the present suit against the surcties we have a written obligation which has been vitiated as an instrument of evidence by the deliberate intentional act of the plaintiff's agents, an act done apparently to secure themselves from the blame which might attach to them for their carelessness in accepting an inadequate security, but an act which as effectually deprived the town for which they acted of any right of action against these surcties upon this bond as if they had never executed any bond at all. It is not their deed. But there is another view which is equally fatal to the plaintiff's case. The plaintiff town presents itself here in this very suit in the attitude of ratifying this act of their selectmen.

Whatever might have been thought of the elaborate and ingenieus effort of counsel to establish the position that the inhabitants of the town ought not to be affected by what he claims to have been the unauthorized act of their agents, if they had brought suit on the bond as originally given, it can hardly avail when we find that the first count in the writ asserts the giving of a bond by the defendants in the sum of \$25,000. The plaintiff corporation escents to have been ready to avail itself of the alteration if it passed unnoticed. They can do so, only at the hazard of losing the benefit of their bond altogether. Asserting a claim here upon the bond, in its altered condition, they must be held to have vatified the act of their selectmen in permitting the alteration, and to stend in the same position as a private corporation or an individual does in bringing suit upon an altered instrument.

That position is not improved by any acts or omissions on the part of the sureties. They gave no implied authority to the principal and to the town officers to insert such sum as they might agree upon, by executing the collector's bond in blank, as was done in the case of South Berwick v. Huntress, 58 Maine 89.

The condition of the mortgage of the principal's property sectived by two of the suretice to secure them against all "legal Mahilities" upon this and two other bonds, is so framed as to

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exclude the idea that they intended to ratify the alteration. Even if they had not already paid upon the other bends a sum larger than the estimated value of the mortgaged property, the reception of this mortgage could not be construed as a ratification.

As to them the plea that this is not their deed is well make tained. Buch a defence cannot avail the principal who made the alteration. Plaintiffs have leave to discontinue as to the sureties.

The dectrine of the feregoing case seems most unquestionable. Indeed, it may fairly be said to be so far removed from the deleatable ground as not to involve any question which, upon the present state of the decisions, could properly be regarded as even doubtful.

The alteration seems to have been material beyond all debate, raising the penal sum tenfold. According to the old rule of the English law, as laid down by Lord Coxx. in his commentary on Pigett's Case, 11 Co. Rep. 27, if any deed be altered in a point material by the plaintiff himself, or by any stranger, without the privity of the obligue, it thereby becomes void. And the same rule is maintained so late as Devideon v. Cooper, 11 M. & W. 778; 13 Id. 343; where Lord Azzwezz, C. B., in giving judgment, repeats the very words of Lord Conn as being still law. But the rule seems never to have obtained to the same extent is this country. It is required here, at present day, that the alteration should be material, in order to affect the validity of the instrument: Michels 'v. Johnson, 10 Coun. 192; Langdon v. Paul, 20 Vt. 219; Waring

v. Sold, 2 Borb. Ch. 139; but by order to avoid the contract, it must be table by the privity of the party intuited to enforce the contrast, and also with a frandulent purpose, and not by mais mintake or misapprobancium: Adino v. Frge, S Moto, (Mass.,) 106, Det Sauc there can be no question whateour suits this point. For it is idle to question whether a town, arthur all corporation, can enforce coultings in in favor against suretice when the aniount has been raised by its own plinnings, onecative officers by arresponded with the principal without the commission of the sureties.

We understand the English courts to have adopted of late much the inner always upon this question with our armaments—that the alteration must be in same material matter and with the privity of the party in interest, and natify a pure stranger, or by mistake and without freedulent purpose: Hirechnes v. Budd, Law Rop. 3 Exch. 171. The rule that alterations by a stranger will not affect the contract, seems to be established in the Irish courts: Suring v. Burty, 2 Jones Ir. Exch. 100.

1. F. E.

Court of Appeals of New York.

MARTHA D. RODERIGAS, ADMIN'X, &c., Resroussest, a THE BANK RIVER SAVINGS INSTITUTION, APPRILANT.

A payment by a debter to an administrator daily appointed is well, and a flur to a second action, although the supposed intestate is alive at the time and the letters of administration are subsequently revoked for this reason.

Although Surrigate courts are of Hasted and special jurisdiction, which depends upon the existence of certain facts, yet their decision upon the existence

of such facts and their consequent jurisdiction is conclusive until regularly reversed or vacated, and will protect all innecest parties acting on the faith of it.

· In October 1857, the intestate, James Divine, deposited with the defendant, a savings bank in the city of New York, the sum of \$485, and soon thereafter went to the island of Cuba, with his wife, the present plaintiff, to reside, leaving his wife's mother, 'Isabella McNeil, residing in the city of New York. Neither James Divine, nor his wife, having returned to New York in April 1860, Mrs. McNeil applied to the surrogate of New York for letters of administration upon his estate, upon sufficient formal proof that he had died intestate, leaving assets in the county of New York, and that his wife was also dead, and that she was a creditor; and in May, 1869, the surrogate granted letters of administration to Mrs. McNeil upon his estate. proceedings resulting in the letters of administration complied within the statutes upon the subject, and were all regular in form. After letters were issued to her, she went to the savings bank, produced her letters, and demanded and received the deposit. which had been made about twelve years before, with the accumulation of interest. In May 1872, the plaintiff returned from Cuba to New York, and then for the first time learned what her mother had done; and she applied to the surrogate for letters of administration upon her husband's estate, upon allegations and proof that he lived in Cuba until March 1871, when he died intestate, and the surrogate revoked the letters which had been issued to Mrs. McNeil, and granted letters to the plaintiff, who had again married. The plaintiff them demanded the deposit of the defendant, with the accumulation of interest, and payment being refused, she brought this action. In the court below plaintiff recovered, whereupon defendant brought the case to this court, where it was argued before six judges, and these being equally divided, it was argued again before a full court

S. P. Nach, for appellant.

S. Jones, for respondent.

The opinion of a majority of the court was delivered by MARL, J.—The sole question for our consideration is whether the payment to the first administratrix is a defence to this action. It is claimed on the part of the plaintiff that the surrogate, in granting letters upon the estate of her husband, who was not-

then dead, acted wholly without jurisdiction, and that his proceedings in granting such letters were null and void. The question as to the effect of letters granted under such circumstances, has never, so far as I can discover, been decided in this state, and is in this case for the first time before this court for consideration.

Surrogate's courts are courts of limited and special jurisdiction, and yet their jurisdiction to grant administration upon the estates of deceased persons is general and exclusive. No other courts can act and discharge the same functions. Before their proceedings can have any validity or confer any authority, they must have jurisdiction to act, and this is true of all courts. No court, no matter how general its jurisdiction may be, which proceeds without jurisdiction in the particular case, can make a valid record, or confer any rights. When a statute prescribes that some fact must exist before jurisdiction can attack in any court, such fact must exist before there can be jurisdiction, and the court cannot acquire jurisdiction by erroneously deciding that the fact exists, and that it has jurisdiction. But when general jurisdiction is given to a court over any subject, and that jurisdiction depends in the particular case upon facts which must be brought before the court for its determination upon evidence, and when it is required to act upon such evidence, its decision upon the question of its jurisdiction is conclusive until reversed, revoked or vacated, so far as to protect its officers and all other impocent persons, who act upon the faith of it: Miller v. Brinkerhoff, 4 Denie 119; Staples v. Fairchild, 8 N. Y. 41; People v. Sturtevent, 9 Id. 268; Skinnion v. Kelly, 18 Id. 356; Porter v. Purdy, 29 Id. 106; Bumstoad v. Read, 81 Barb. 661; Grignon's Lesses v. Astor, 2 How. (U. S.) \$19; Halcomb v. Phelps, 16 Conn. 127; State v. Scott, 1 Bailey's Law R. 294; Raborg v. Hammond, 2 Harris and Gill 42; Brittain v. Kinnaird, 1 Brod. & Bing. 482. This rule as to the jurisdiction of officers and courts of limited and special jurisdiction has many illustrations in the cases cited. In Maples v. Fairchild, the rule is announced as follows: "Where certain facts are to be preved before a court or officer of special and limited jurisdiction, as a ground for issuing process, and there is a total defect of evidence, the process will be void; but where the proof has a legal tendency to make out a proper case in all its parts for the jurisdiction of the court or efficer, although such proof may be slight and inconclusive, the process will be valid until set aside on a direct proceeding for that purpose. In one case the court acts without authority; in the other, it only errs in judgment upon a question properly before it for adjudication. In one case there is a defect of jurisdiction; in the other, there is only an error of judgment."

In Porter v. Purdy, the following language is used: "When in special proceedings in courts, or before officers of limited jurisdiction, they are required to ascertain a particular fact, or to appoint persons to act in such proceedings, having particular qualifications, or occupying some particular relation to the parties or the subject, such acts, when done, are in the nature of adjudientions, which if erroneous, must be corrected by a direct preceding for the purpose; and if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be." In Grignon's Lasees v. Aster, where by a law of Michigan, the county courts had power under certain circumstances, to order the sale of the real estate of a deceased person for the payment of debts and legacies, it was held that it was for that court to decide upon the existence of the facts which gave jurisdiction. In Brittain v. Kinneird, DALLAS, C. J., said: "The magistrate, it is arged, could not give himself jurisdiction by finding that to be a fact which did not exist. But he was bound to inquire as to the fact, and when he has inquired, his conviction is conclusive of it."

The jurisdiction of surrogate's courts is defined, and their precessings are regulated in our statutes. It is provided (2 R. S. 74, sec. 28), that the "surrogate of each county shall have sole and enclusive power within the county for which he may be appointed, to grant letters of administration of the goods, chattels and credits of persons dying intestate, in the following cases: 1. Where an intestate, at or immediately previous to his death, was an inhabitant of the county of such surrogate, in whatever place such death may have happened. 2. Where an intestate, not being an inhabitant of this state, shall die in the county of such surrogate, leaving assets therein. 3. Where an intestate, not being an inhabitant of this state, shall die out of the state, leaving assets in the county of such surrogate, and in no other security. 4. Where an intestate, not being an inhabitant of this state, shall die out of the state, but

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assets of such intestate shall thereafter come into the county of such surrogate." It is further provided (sec. 26), that "before any letters of administration shall be granted on the counts of any person who shall have died intestate, the fact of such person dying intestate shall be proved to the entisfaction of the surrogate, who shall examine the persons applying for such letters on oath, touching the time, place and manner of the death, and whether or not the party dying left any will; and he may also in like manner examine any other person, and may compel such person to attend as a witness for that purpose."

Under these provisions of the statute the surrogate can no more institute a proceeding than the judge of any other court can institute a suit. He must wait until some person interested cours before him, and upon proper allegations invokes the exercise of . his jurisdiction, and then he has not the option to exercise it: he must exercise it. If he should refuse to act, he can be estapelled to action by mandamus. While the statute gives him no jurindletion to administer upon the estate of a living person, it imposes upon him the duty of inquiry as to the death of any person upon. whose estate letters of administration are applied for, and the inquiry is a judicial inquiry. In discharging that duty he may examine the person applying for letters, and examine other witnesses, and in making such examination he is discharging his judicial functions, and exercising his rightful jurisdiction. His can compel the attendance of witnesses before him by attachment, and false swearing would be perjury under our statutes upon that subject. When proof has been produced to his satisfaction, the other conditions of the statute being complied with, he must issue letters. The inquiry may be a difficult one. In many cases in the time of war, in the case of absence upon the seas, or in forgign lands, and in the case of long absence unboard from, death cannot be proved with infallible certainty. Witnesses may be natrathed or mistaken, and the surrogate may thus be led into error. Yet he must act; the statute makes it his duty to do so. He must decide upon the fact of death as best he can upon the evidence produced, exercising a judgment not infallible. Does be decide at his peril? If he decides one way, has be jurisdiction, and if he decides the other, has he no jurisdiction, and has he had none?

The claim is, that if death has not occurred, although the currence may have been satisfied by the clearest proof before him

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that death had occurred, his proceedings are a nullity for want of The consequence is, that they furnish no any jurisdiction to act protection to any enc. The surrogate who has in good faith ordered the sale of property and the distribution of mency, may in after years be made liable for the whole estate. After many years it may be a question whether the intestate died in one month or in another month earlier or later, and shall the jurisdiction of the surrogate, and the validity of his proceedings, and his protection against liability, depend upon how this question may be determined by a jury upon disputed evidence? If the surrogate's proecclings are to be held null and void in case he errs as to the fact of death, the same result must follow if he errs as to the place of death, and as to the other facts mentioned in section 28, above The fact of inhabitancy is frequently one difficult to be determined. It is one the surrogate must determine before he can issue letters, and its determination frequently depends upon disputed and fallible evidence, and if error as to the fact of death will leave him with no jurisdiction, so will error as to the fact of inhabitancy, and the consequence will be, that in such a case his procoolings will give no protection to any one. A construction of the statutes which will lead to such results, will make the laws as to the jurisdiction and proceedings of surrogates courts difficult and hazardous to execute, and should not be telerated unless the language will admit of no other construction. I am of opinion, taking into consideration the various provisions of the statutes, that it was the intention of the legislature to confer upon surrogates' courts sole and exclusive jurisdiction over the subject of granting letters of administration, and as part of that jurisdiction to determine the facts upon sufficient evidence upon which their action must rest.

As early as 1792 (2 Groenl. 420), in the preemble to an act concerning administrations, it is recited that "administrations had been frequently granted in that state upon the mere suggestion of the party applying for the same, without due proof of the death of the person upon whose estate they were granted; and it had happened that administrations had been granted upon estates of persons who were then living and reciding within this state, and administrations were frequently granted to persons in no wise related to the intestate, and who procured administrations only with a view of appropriating the estate of the intestate to their own use; from which practice great inconveniences were likely to ensue, for remi

edy whereof it was exacted 'that no letters of administration should thereafter be granted by the judge of probates, or by any surrogate, upon the estate, goods, chattele or credits of any person, represented as having died intestate, until due proof be reade before the said judge or surrogate, to his satisfaction, that such person was dead, and died intestate." And substantially the same provision has been continued in the statutes to this day. This provision has made it the duty of the surrogate to institute a judicial inquiry into the facts of death and intestacy. The stututes furnish a complote system. The surrogate is to take judicial action, and determine the facts upon which his jurisdiction rests. If the case be a proper one, he must issue letters, and then the letters are conclusive evidence of the authority of the administrator, until reversed on appeal or revoked: 2 R. S. SO, sect. 56. There is ample power to revoke or vacate letters in case they have been improperly granted, but in that case the acts of the administrator done in good faith are valid: 2 R. S. 80; sect. 47; Laws of 1887, ch. 460; Flinn v. Chase, 4 Denio 85; Kerr v. Kerr, 41 N. Y. 472,

The administrator is required to give a bond that he will faithfully execute his trust, and obey all orders of the surrogate toeching the administration. Taking all these provisions together, it is apparent that it would be rare that a living person would be seriously harmed by administration upon his estate. But it is otherwise with persons who deal with these who are thus clothed as administrator with the conclusive evidence of authority. This defendant, when called upon by the first administrator, could not resist payment, even if it had been practicable for it to accordant that Divine was then living, and whether he was dead or alive was an issue which it would not have been permitted to litigate: Preser v. Wagner, 87 E. C. L. R. 287, and note; Belden v. Meeker, 47 M. Y. 307; Parkem v. Moren, 4 How. 717; Wass. on Exrs. 492.

As my conclusion in this case is based upon the construction of the statutes of this state, regulating the jurisdiction and proceedings of surrogate courts, decisions from other states made under statutes not the same can furnish us little aid. But the following authorities tend somewhat to sustain the conclusion I have reached: Buttered v. Road, \$1 Barb. C. C. 1; Bolton v. Brewster, \$2 Id. \$39; Monell v. Dennicon, \$ Abb. 401; Halcomb v. Phops, 16 Conn. 127; Raborg v. Hammond, 2 Har. & G. 42; Parkem v.

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There is a dictum, adverse to my conclusion, in Allen v. Dundas 8 Term Rep. 125; and also in Griffith v. Frazier, 8 Cranch 9. In Jochumeen v. Suffolk Saviage Bank, 8 Allen 87, the precise question involved in this case, of the payment by the savings bank to an administrator of a depositor, appointed in his lifetime, was decided under the Massachusetts statutes, adversely to the views I have expressed. It was held that the depositor could recover, notwithstanding the prior payment by the bank to the administrator. In Bolton v. Jacks, 6 Robt. 166, there is a learned discussion of the question of the jurisdiction of courts, and it was there held that if a surrogate admitted to probate a will of a testator, not at the time of his death an inhabitant of this country, he acted without jurisdiction, and that his proceedings were void and esuld be attached collaterally. I believe the decision to be unsound in this respect. A further criticism of cases to which our attention has been called, would not be useful. The question for our decision is not free from doubt. A decision either way would be confronted with some authority, and meet with some logical difficulties.

The judgment must be reversed, and a new trial granted, costs to abide event.

The decision in this case is probably without a precedent, either in English or American jurisprudence, and the argement of the learned judge on the questhen of policy, that as attempts to adminther upon the estates of living persons are likely to be rare, it is better such persons, having been adjudged to be dead, should be so treated, then that the numerous acts of their quasi representastes should be held void, might be apt to remind discenting readers of the memorable instance of the high priest, who councelled that it was better for one inperpet men to be put to death then that the whole nation should be kept in uprear. And still, we cannot but see that there is really nothing intrinsically absaid in the decision, when looked at merely upon the principles involved in it. It is only declaring probate courts in the state of New York to be courte of general jurisdiction and cutitled to

the same conclusive presumptions in favor of their jurisdiction, which we apply to the superior courts of a state or nation, and to superior courts of record of general jurisdiction. This presumption, within certain limits, would, no doubt, prove salutary. There is no very good reason why the jurisdiction of courts of probate, so far as it depends upon domicile within a particular district within the state, should be allowed to be attacked colleterally and all the proceedings rendered nugatory. But the decisions to this extent are very numerces, and here never been questioned to our knowledge: Cuth v. Harkins, 9 Mass. 543; Weles v. Willard, 2 Ed. 120; Holyake v. Harkins, 9 Pick. 289; s. C., 5 Id. 20; Ex parte Backer, 2 Leigh 719. And it has even been held that the same consequences will follow where a stranger is appointed administrator, without it appearing that there was no

next of kin who might have been appointed: Languerthy v. Baker, 23 III. 484. Some of the decisions professedly going upon this view may have misapplied the principles, and all of them preceed upon grounds more or less techninical. But when the rule of the conclusiveness of the records of probate courts comes to be applied, not only to questions of jurisdiction, a class of cases to which, to that extent, it never has been before sociled at all, but to be extended also to a case, where no court sould possibly obtain jurisdiction ever the subject-matter, the very cases belli, or contingency upon which the jurisdiction attaches not having yet transpired, we may, as it seems to us, well demand some more compelling reasons for the extension than any prosented by the learned judge in the principel case.

There is probably no rule of law more unquestionable than that courts of special and limited jurisdiction must set forth upon their judgments all the facts upon which the jurisdiction of the courts depend, or such judgments will be absolutely void, upon the very face of the proceeding. The cases upon this point are too numerous to be cited, and there is no conflict among them. Many of them, both Euglish and American will be found in the notes to Creppe v. Durden, 1 Smith's Lead, Cas. 976 et seq. And the rule is the same in regard to courts of general jurisdiction, where the want of jurisdiction appears upon the face of the record; but the mere emission to state, in the record of such courts, all the facts constituting the jurisdiction, may be supplied by intendment or presumption, which cannot be done in the case of courts of special and Hanted jurisdiction: Peacock v. Bill, 1 Sound. 78; Grignus v. Aster, 2 How. (U. S.) 319; Huntington v. Charlette, 18 Vt. 46; State v. Kimberough, 2 Dev. 481.

tiaction between courts of superlay and general jurisdiction and those whose jurisdiction is special and limited, that in the latter case the jurisdianum may be attacked and defeated in any deflateral proceeding, by showing that, although the court determined the facts constituting its jurisdiction, duly act them forth upon the precedition, so as to give pries facie jurisdiction, yet this was founded in error and mistake of the court; while as to the foreign-class of courts, the jurisdiction will and only to presumed, in the absence of any regital in the record of the facts messeary to give jurisdiction, but this protumption is one of the class of conclusive aresumptions, presumptiones furis et de fure. so that no evidence can be received to disprove it: Rordon v. Fitch, 13 Johns. 121; Denning v. Cornin, 11 Wand, 647,

There is no end to the cases, all in one direction, in favor of the above preposition. And even where superior courts of general jurisdiction exercise a special, limited, statutory power, the same rule is applied to their precondings as to courts of special and limited jurisdiction: Denning v. Cormin, mores Sharp v. Spair, 4 Mill 76; Briller v. Kells, 7 Hill 11.

There may be some uncertainty in separating these two classes of courts in some cases, but there is no suntroverse, we believe, or has been more hitherth. that courts of probate, whose jurisdistion is created and defined by statute, for the settlement of estates, within partieular defined districts, must be regarded both as inferior courts and of annial and limited jurisdiction, and that no presumption could be made in favor of their jurisdiction beyond what cancered on the fees of their proceedings, and that, even where that appeared regal it might be contradicted in any estimaterai proceeding and the whole tation of the court rendered anumbers and relates And there is another important dis- all purposes. But when we could be And all this ignored and set acide by one of the ablest courts in the country, and the opposite views maintained and applied to a state of facts where no court could possibly obtain jurisdiction any more than it could obtain jurisdiction of case who was never born, or had already deceased, we must confess to a new sense of the uncertainty of the law.

We rejuice that there is still some authority in the opposite direction in the decision of the Supreme Judicial Court of Marachusetts, in the very able opinion of Mr. Justice Dawny, in Jochnam v. Suffilk Savings Bank, 3 Alice 87, and in the decisrations of other eminent jurists; Chief Justice Managant, in Griffith v. Fracier, 8 Creach 9; the court in Fish v. Newel, 9 Texas 14, and in every other case where the question has arisen, until now.

It seems to us a matter of some weight that, under the English Statute of 1967, 20 & 21 Viet., chap. 77, by which a court of probate of general jurisdiction, throughout all England, and of the same grade as the superior courts to Westminster Hall, was greated, it should still he regarded as a matter not open to debate, that even an administration granted by that court, of the goods or probate of the will, of one still living, is absolutely void, and its effect may be defeated in any collateral proceeding by oral proof. Mr. Horsey, the author of a popular book on Probates and Administrations, p. 187, says : "Melther is a prohate conclusive evidence of the death of the testator; and if he be living, the probate is utterly void."

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Supreme Court of Ohio.

WILLIAM BROCK ST AL & HENRY B. BATEMAN ST AL

Where a partnership and the several members of the firm are insolvent, and there are no partnership funds for distribution among its creditors, the creditors of the firm are entitled to there equally with the creditors of each partner, in the distribution of his individual assets, the amount so distributed to the creditors of the tirm, however, not to exceed the amount of their claims.

MOTION for leave to file a petition in error to reverse the judgment of the District Court of Madison county.

A. J. Brock and Marion Slaughter were partners dealing in hoge and eattle, and the firm, as well as both partners, became and are still insolvent. Each of the partners, and also the firm, made a general assignment for the benefit of creditors, the defendants in error being the assigness of Brock and also of the firm, and E. G. Coffin being the assigness of Blaughter.

The assets of the firm amount to only \$6.86, a sum insufficient to pay the costs of administering the trust. The assets of A. J. Brook amount to \$37,341.18, and are in the hands of his assignoss ready for distribution; and there is also a large amount

of assets of Slaughter in the hands, or to some into the hands, of his said assignce. There are numerous creditors of each of the partners and also of the firm.

The original petition in this case was filed by the assigness of Brock and of the firm against Brock, Blaughter, the creditors of Brock, the creditors or the firm, and the assigness of Blaughter, setting forth the facts aforesaid, and praying the court to make such order as to marshalling and distributing the fands so in their hands as equity and justice require.

The defendants waived the issuing and service of precess, and by their written agreement submitted the cause to the court "upon the facts so stated in the petition, and without further answer on their part." The cause was accordingly heard in the Common Pleas upon the petition alone, and was taken by appeal to the District Court, where the defendants made a metion for leave to file an answer and cross-petition, controverting material facts stated in the petition. This motion the court overruled, and on the hearing rendered a decree to the effect that the creditors of the firm should share equally with the individual creditors of each member of the firm in the distribution of the individual areats.

The individual creditors of Brock now ask leave to file a petition in error to reverse the judgment of the District Court, alleging that the court errod in overruling their motion for leave to file the answer and cross-petition, and also in adjudging that any part of the individual assets should be distributed to the creditors of the firm, until after the individual creditors should be paid in fall.

Winana, Derlington & Smith, with whom were also Wilson & Durflinger, for the motion.

George Lincoln and Harrison & March, contra.

Weron, J.—Motions for leave to amond or change the pleadings, in appealed cases in the District Court, are addressed to the sound discretion of the court, and its rulings thereon will not be reversed on error, except where all the facts bearing upon the motion are set forth, and where there has been a manifest chase of discretion. No such case is made here. For aught that appears there may have been good reasons for refusing the motion. Apparently the greating of the motion would have necessitated

is continuance of the cause, as it is not shown that any notice was given the opposite party of an intention to make the motion, so as to enable them to prepare for trial. No reason is assigned for the motion, except the fact that the matters set up in the answer were unknown to the defendants at the time of trial in the Common Pleas. What other facts bearing upon the propriety of granting the motion were shown by either party, does not appear.

Mer do we see any error in the decree rendered by the court upon the final hearing. The creditors of the firm trusted both the partners, and had a valid claim against each for the full amount of the partnership debts, whereas the individual creditor ealy trusted one of them. It would seem, on principles of natural justice, therefore, that the assets ought to be so marshalled in such cases as to give some preference to the partnership creditors over those of the individual members of the firm. sutherities on the subject are not uniform. It seems to us, however, that the better authorities, both English and American, as well as reason, establish the justice of the rule adopted by the court below. In other words, equity will apply the assets of an inscivent partnership in payment of the creditors of the firm, to the exclusion of creditors of its individual members, and if there be no partnership assets for distribution, as was the case here, the ereditors of the firm have a right to share equally with the crediters of each individual member of the firm in the pre rate distribution of his assets. Of course, the aggregate amount so distributed to the creditors of the firm must not, in any case, exceed the amount of their claims. It is true that this rule may week hardship and apparent injustice in particular cases; so, it is believed, will any general rule that can be deviced. We understand it to be the rule established by the decision of this court in Rogers v. Meranda, 7 Ohio St. 179. What should be the rule where the partnership assets are insignificant, or where they will yield to the creditors of the firm a less dividend than the creditors of the individual members would realize from the individual assets, and whether the creditors of the firm should, in such case, be confined to the partnership assets, we are not called upon in the Motion overruled. present case to decide.

MCILVAINE, C. J., WHITH, REX and GILHORE, JJ., concurred.

The principles upon which access concitating of partnership property and of among creditors in cases of insolvency, bankrupter, and administration are not uniform or clear. It is prohably safe to say, that everywhere throughout the common law countries (except formerly in Vermont, Reed v. Shephurdson, 2 V1. 120), the joint estate (firm property) is reserved for the payment of the joint or firm creditors, and that the separate creditors can only come upon the explus remaining after payment of the joint debts. The better opinion seems to be, that this preference arises, not from any superior merit in the joint ereditors, but from the nature of the partnership relation. A partner owns nothing in the firm property except his shere of what may remain after payment of the firm debts, and of his debts, if any, to the firm ; so that his co-partpers have an equity that the firm property should not be taken for payment of his separate dobt, until it be escertained what the amount of his interest is. Therefore, it is quite plain, that in distributing joint estate among the two classes of creditors, the joint creditors must be paid in full, in order that justice may be done between the partners themselves, before any dividend can be looked for by the separate creditors. But what are the rights of the joint creditors in the separate estate, is a question of much greater doubt. It has been held :

- 1. That they are to be excluded from everything but the surplus of the separate estate, just as the separate ereditors are from the joint estate.
- 2. That they are to be thus excluded, unless there is no joint estate and no living solvent partner (and in England, also, whose the petitioner against the separate estate is a joint creditor, an exception which will not be considered in this note), when they may come in upon the separate estate pre rate with the separate creditore.
- 8. That after exhausting the joint estate, they may come in for the balance

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pro rate with the separate creditors, upon the surplus of the separate create remaining after the latter have received from it an equal dividend.

In McCulloh v. Dushiell, 2 Harris & Gill 105, the court applied the rule which makes each estate may be own debts as a general principle of equity to the administration of a documed partper's assets. Ancreus, J., condemned the exception in favor of joint creditors, when there is no joint estate and no living solvent partner, as unequal, i. c., unreciprocal, and therefore, inequitable. Inasmuch as there was a Joint estate of \$35, the exception could not have applied, and need not have been considered. In Jarvis v. Breaks, 3 Fester (N. H.) 136, and Creckett v. Creckett, 33 N. H. 542; Gensen v. Lathrep, 25 Barb. 454; Wilder v. Kody, 2 Paige 172; Payne v. Matthews, 6 Id. 19; Hall v. Hall, 2 McCord Ch. 308; similar views were cutertained as to the reciprocal preference of the two classes of creditors in their respective estates, but nothing was said as to the emeption in case of no joint property and no living partner.

Lord Ch. Hancount first leid down the rule we have just been disensing in Exparts Crouder, 2 Vern. 706 (1715). followed by Lord Ch. Kine, in Ex parte Cook, 2 P. Wms. 300, and by Lord HARDWICKE in Experte Buster, 1 Atk. 228. In Experte Megden, i Dr. Ch. 454, Lord Turnsow introduced the exception in favor of the joint creditors, that where that is no joint course travier paive on bes. estate they may come in upon the separate estate pre rule with the separate creditors. But a joint course, however inconsiderable, if it be distributable, i. e., not less than the expenses of distribution, nor pledged for more than its value, will prevent the eparation of this exception. In Exporte Peaks, 2 Rest 54, the joint course was M. 11s. Cd., and Lord Export said Are skillings would be enough. In his juste Hodgson, 2 Br. Ch. R. 5 (1755), Lord Thursday broke down the rule entirely. and said there was " no distinction as to joint and reparate debts, and said he thought proper to declare, that debts, whether rule or joint, ought to be paid out of the benkrupt's estate, which is composed of his separate estate and of his moisty of the joint estate." Lord Loconponocon re-established it in Ex parte Ellen, 8 Ves. Jr. 258 (1796), and it has never since been departed from. He explained Lord Tuck Low's practice, as has often been attempted in the cases since (Jarris v. Brooks, 8 Foster 142: Murrell et al. v. Neill, & How. 414), as a rule of convenience, publicet to the limitation that the masignee of the separate estate might at any time, by a bill is equity, prevent the joint creditors from receiving a dividend from it until the separate ereditors had been paid in full. This hardly consists with the language of Lord Turneow, who evidently contemplated, not merely that the joint ereditors might prove their claims under the separate commission, and receive a dividend if there were no opposition, but that they should receive it pro rate with the separate creditors, whether the latter were paid in fall or not. Yet, on the other hand, in Es purte Flintum, 8 Br. Ch. 198, he alted Ex parts Crisp, 1 Atk. 188, as the case on which he founded his opinion, the facts of which do not seem to justify ft. It was a potition by a bankrupt, against whose separate estate Lord HARDWICKS had allowed a commission to loves, upon the claim of a joint creditor to have the commission superseded. All the joint ereditors had been paid or secured in full by the other partners, and the Chancellor granted the prayer of the retition, upon condition that within one nth the petitioner paid all the sepa-

debte. There was, therefore, no

contest whatever between the two classes of creditors. Es perte Ellen is the law of England to-day, as on examination of the Bankruptcy Act of 1869, and Bankruptey Maies of 1870 will show (see also 8 Lindley on Part., p. 1201), and we shall speak of it hereafter as the English rule. It is followed in Ladd v. (irrowold, 4 Gilman (III.) 25: Publican v. Graves, 26 Ml. 407, and in Ponnayivania, in all cases of bonkruptcy and innoivency. In McCarty v. Emlen, 2 Yeates 190; Sualgrow' Appeni, 1 Harris 471; Walker v. Egth. 1 Carey 216; /Nack's Appeal, & Wright 908 ; Hackman v. Massenger, 18 Wright 465; Franc's Estate, 28 P. F. Statth 465 ; Toomba v. Ilill, 28 Geo. 871 : Smith v. Mallery, 24 Ala. 428; Murrell et al. v. Neill, & How. 414, and in Ohio, Redgers v. Meranda, 7 Ohio St. 179, and the principal case.

In lienk v. Krieer, 2 Davall 100, and Whitehood v. Chadwell's Adm., Id. 482, a mean between Lord Turn-Low's view and the English rule was adopted as the true equitable distribution. The court held, that while the joint creditor should be allowed an exclusive priority in the joint estate, the princity of the separate creditors in the separate estate should be reciproral only in amount, and that the surplus of the separate estate, after they had reecived a dividend equal to that paid the joint creditors from the joint estate, should be divided pro rate between both. These cases apply to all contests between the two clarees of creditors, the rule which to Bell v. Nesmen. 5 S. & R. 78, was applied to administration alone.

In Berdeell v. Purp, 10 Vt. 202;
Norman v. Balloy, 16 Plek. 270;
Allon v. Wells, 22 Pick. 420; Treker
v. Oxley, 5 Creach 41, and Comp v.
Grant, 21 Conn. 62, the view is taken
that the joint creditors may prove
against the separate course, but that the
court, upon the familiar principles of

marshalling assets, where one creditor has two funds upon which he may come, while the others have but one, will compel them to exhaust the joint before they receive any dividend from the separate estate.

This principle, in one shape or another, has been applied almost universally in cases of insolvency and henkrupter, but a further difference of estaion is found in the books as to whether it is as a rais of convenience confined to those kinds of distribution, or whether it is a general principle of equity, and as such, applicable in all disputes between Joint and separate creditors, consciolly in the administration of assets. Lard Rapov applied it as such in a case of administration: tires v. Chinvell, 9 Ves. Jr. 123; and it was so applied in Wihler v. Keeler, Passe v. Matthews, Hell v. Hell. McCallah v. Dushidl, Ladd v. Grinedd, Pohlmon v. Graves, Toombe v. Hill, Smith v. Maliery, supra, and in Woodrep v. Word, S Reseausoure 208. In Ohio, the coutinry was at first hold t Gracenor v. Austin, 6 Obio 103, which, however, must be regarded as overruled by Redgers v. Meranda, sepra.

Whether the English rule applies in Ponnsylvania to administration or not, to involved in some doubt.

In McCarty v. Emlen, B Youtes 199, the question arose whether a debt due a partnership could be attached for the private debt of one of the partners. The court held that it could, and the interest of the partner would be bound thereby, and demissed the English cases atted, supra, saying that they only applied in cases of bankruptey and inenivency . Ynaven, J., discented. In Bull v. Nouman, 3 S. & M. 70, the administrator, Johndont, had in his hands separate property of the decedeat and from property not raffielent to pay the firm deles. Chief Justice Traceway held that the Rug-Mak rule was not a general principle

of equity, but a rule of convenience applied in bankruptcy and insolvency; that the question being one of administration, was to be regulated by the Act of April 19th 1794, which required an equal distribution of a decedent's assets, which would be attained by allowing the joint creditors to exhaust the joint fund, and to come in for the balance upon the separate fund after the separate creditors had reserved from it an equal dividend.

Denoun, J., concurred, but went further, and thought that the joint creditors ought to have been allowed to some in upon the separate estate provide with the separate creditors. General with the separate creditors. General thous taken by Tilouxan, C. J., helding the English rule to be one of general equity, applicable to all cases of distribution among creditors, and that the Act of 1794 only meant that in cases of deficiency of assets, each fund should be equally distributed among ite own peculiar class of creditors.

In Sporry's Estate, I Ashmend 247, although there was no occasion to compare the English rule with that of Ball v. Neuman, because there being no joint estate, and no living solvent partner, the distribution would have been the some under either; yet Kino, J., did maintain the letter vigorously.

In Black's Appeal, 3 Wright 302, Twoxroos, J., west out of his path in an opposite spirit, the case being one of insolvency, to condomn the rule laid down in Bell v. Normes, in cases of administration, enying that the dissenting spinion of Grance, J., was the best argument that could be made against it, and that the English rule was a general principle of equity. In McChruick's Appeal, 5 P. P. Smith 252, the administrator of Hayes, a deceased partner, confused a fund in his hands of \$2007.00, belonging to the separate estate of the decedent. Hayes, at his death, evel the

Arm of Hayes & McCormick \$5385.45. The dobts amounted, after distribution of the first property, to \$16,869.68. The assignee of the firm claimed a dividend from the separate estate upon one-half of each of these sums. The court awarded it only in one-half the former, as being a separate debt due by one portner to the firm. Thus the English rule was applied to a case of administration, in clear departure from Bell v. Neuman, which was not cited in argument or in the opinion of the court, Acrew, J., founds his opinion on Black's Appeal, which was a case of incolvency. "When Haves died, the law undertook the settlement of his affairs. As the rights of creditors then attached to his estate, when it fell in gremium legis, so they must remain. His debts were two-fold in kind, these he owed in common with McCormick to their partnership creditors; and those he ewed to his individual creditors. He left also two funds, his interest in the partnership effects, which were bound to the payment of the partnership creditors through the instrumentality of the surviving partner, and his separate assets bound to the payment of his individual debts through his administrators. Each fund being insufficient, neither class can receive anything from the opposite fund." A similar departure from Bell v. Newman seems to have been made by the Orphans' Court of Philadelphia in McKenna's Estate, I Weekly Notes 517, reported also in 32 Legal Int. In the clause: "We think the auditor rightly postponed the claims of the co-partners;" we presume the word co-partners is intended for co-partnership creditors. We wish that in both these cases, especially in the first, that it had been distinctly stated whether it was the intention to overrule Bell v Neuman.

The closing remarks of the court in the principal case, declining to consider what distribution should be made when there was a joint estate distributable, but triding, or even where the joint creditors should receive from their estate a smaller dividend than the separate did from theirs, show that much tossing upon this painful question may be still expected in Ohio.

H. G. W.

Supreme Court of Illinois.

EPHRAIM INGALS s. CECILIA B. PLAMONDON ET AL.

Land which is covered by a party-wall remains the several property of the owner of each half, but the title of each is qualified by the easement of the other of support of his building by means of the portion of the wall belonging to his neighbor.

The ensement of support is the only proper one attached to a party-wall, and does not include a right to the unobstructed use of a fine by one of the parties which is on the land of the other.

The common law rule is that where the owner of two heritages, or of one consisting of neveral parts, arranged and adapted them so that one derives a benefit from the other of an phylous and continuous character, and then conveyed one of them without mentioning such incidental advantage or burden of the one in respect to the other, there is an implied agreement that such advantage and burden shall continue as before the separation of the estate.

In order to affect a purchaser of property with notice of an element in favor of an element, the same must be continuous and apparent,

The owner of a fifty-foot lot divided the same into two equal parts by an east and west line, and built a dwelling-house an the north part, and placed the south wall thereof so that half of it stood on such lot, and also made an eight-inch projection on the south side of the wall resting on the south lot, containing a flux which was specially adapted and used for carrying off smoke from a farance parameterly built in the house. The owner conveyed the north half of the fifty-foot let to the courte of the south wall, with the house, to complainant, and subsequently sold the south half of the fifty-foot let to defendant. Bold, That the casement being obvious and apparent to any observer, the purchaser of the south let was chargeable with notice, and would be enjoined from interfering with the flux.

BILL for an injunction to restrain appelless from closing up or interfering with a flue in the party-wall between the residence of appellant and one in process of erection by appellees. In the year 1868, John Crighton owned fifty feet of ground, upon the corner of Throop and Monroe streets, in Chicago, which was divided into two twenty-five feet lots, and during that year he built upon the north lot a three-story and basement brick house. The south wall was designed as a party-wall, and was so placed that its centre coincides with the division line between the lots, half of the wall being upon one lot and half upon the other. The wall is twelve inches thick, and upon the south side, or side adjoining the vacant lot, there is a projection eight inches thick, caused by the chimney flue. This is the flue appellees threaten to obstruct. It furnishes a smoke escape and draft for the furnace used in warming appellant's house, was built and used for that purpose by Crighton, the original owner of both lots, and the builder of the house during the winter of 1868-9, and until his conveyance of the property to appellant. It has also been used by appellant in the same manner since the conveyance to him.

On February 5th 1869, Crighton entered into an agreement in writing with appellant for the sale and conveyance to him of the north lot, which agreement, after providing for a conveyance on May 1st 1869, which should include the brick house and all appurtenances thereon, contained this provision: "And whereas said Crighton owns the premises next south and adjoining the premises above described, and the south wall of said house, being a party wall, one-half thereof standing upon said lot or parcel of land next south and adjoining; now, in consideration as aforesaid, the said Crighton further covenants and agrees with said Ingale that at the time of the execution of said deed aforesaid, he will also execute a

proper party-wall agreement with said Ingals, to run with the land in case the adjoining owner shall use the same, therein agreeing to pay for one-half of the cost of party-wall when the ground next south of the above described premises shall be improved, the value of said wall to be estimated at the time said land shall be improved and said wall used. The agreement was signed and scaled by both the parties. The purchase price was \$24,000. On May 1st 1869, according to the contract, Crighton made his deed of the north lot to appellant, it being an ordinary warranty deed, conveying the premises, "together with the brick house and barn, and other improvements thereon situate, "" together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining."

On the second day of May 1869, the parties entered into an agreement in writing, under their hands and scale, which after reciting their several ewnerships of the lots, the improvements on appellant's lot, and that Crighton's was unimproved, continued as follows: "And whereas the centre of the south wall of the house so standing on the ground of said Ingals is directly over the line between the grounds of said Ingals and Crighton, enc-half thereof standing upon the grounds of said Crighton, though said wall is entirely and absolutely ewned by said Ingale; now in consideratien of one dollar, and other good and valuable considerations moving from Ingale to Crighton, the receipt of which is acknowledged, the said Crighton covenants with said Ingals that so soon se the south twenty-five feet of the north fifty feet of said lot five is used or improved in such a way that any etructure thereon is connected with said party-wall, he will pay to said Ingals one-half of the cost to build such a wall at the time such portion of said lot is used as aforesaid, and for the consideration aforesaid. Orighton agrees to and with said Ingals to pay for such portion of the barn or other of said Ingals' improvements now projecting upon the land of said Orighton.

"All agreements herein shall be construed as covenants, and shall run with the land and be obligatory upon the heirs, assigns and personal representatives of the respective parties hereto. And it is further agreed by and between the parties hereto that this agreement shall be construed in conformity with the law and usage touching party-walls." This agreement was duly recorded in the recorder's office of Cook county, May 10th 1869.

The south lot continued to be the property of Crighton, and remained unimproved until some time in 1878, when Crighton sold and conveyed the same to the appellee, Cecilia B. Plamondon, wife of Ambrose Plamondon, who soon after her purchase began to improve the lot by the erection of a dwelling-house thereon. An estimate of the amount to be paid by her to appellant, as half the cost of the wall under the agreement, was made and agreed to by the parties, and a receipt therefor in writing given by appellant, releasing Mrs. Plamondon from all claim for compensation for the wall to be used by her in the crection of her dwelling-house, and concluding as follows: "This release, however, not to prejudice or affect in any way any rights of the undersigned except for compensation as aforesaid to which he may be or become entitled under said agreement." (Stat. of May 2d 1869.)

On January 12th 1874, Mrs. Plamondon gave appellant notice in writing that as in the proper construction of her house it might be necessary or desirable for her to close up the fluce which were whelly within the part of the wall for which she had paid appellant, she should proceed to do so whenever her house should have progressed so that such action should seem proper. Thereupon this bill for an injunction was filed. A temporary injunction was allowed, which was afterwards, on motion of appelless dissolved by the court, and upon final hearing on pleadings and proofs, the court entered a decree dismissing the bill, and the appellants took this appeal from the decree.

Frank J. Crawford, for appellant.

Gardner & Schupler, for appellees.

The opinion of the Court was delivered by

SHELDON, J.—It appears from the evidence, the furnace in appellant's house which is used for the heating thereof, was set up and used by Crighton, its builder, and the original owner of both the lots, as it is now erected, that it is not mevable or pertable, but is constructed so as to be permanent, being enclosed by a brick wall connected with the floor and becoment wall. That the flue in question was especially planned and adapted for a smoke escape and draft for the furnace, that there are besides a kitchen and leundry flue in the house, but that neither one of these can be adapted or used for the furnace, that no other flue could be constructed for the use of the furnace without greatly injuring the

house and involving material changes in its plan and arrangement. There is, it is true, the contradictory testimony of Crighton, that the smoke pipe attached to the furnace might be connected with either of the other flues, and that they would either be sufficient to provide a proper draft for the furnace, and that the change could be made at an expense not to exceed \$100; but the testimony of practical architects who had made a personal examination of the premises, including the one who made the plans and designs of the dwelling and superintended its erection, is to the effect as first sheve stated, and their testimony must be taken as more competent and satisfactory upon the point than that of Crighton. closing of the flue then would appear to have the effect to render the furnace useless. Under such circumstances, the flue as it now is and ever has been, must be regarded as reasonably necessary to the beneficial enjoyment of appellant's house. The location of the fue, or at least the greater portion of it, is in the south half of the south wall of the house. The land upon which this south half of the wall rests, the appellee, Mrs. Plamondon, owns by conveyance of it to her from Crighton. This south wall, under the writings in evidence, must be regarded as a partition wall between appellant and Mrs. Plamondon, it having been paid for as such by here Land covered by a party-wall, remains the several property of the owner of each half, but the title of each owner is qualified by the easement to which the other is entitled of supporting his building by means of the half of the wall belonging to his neighbor: Partridge v. Gilbert, 15 N. Y. 601; Brooks v. Curtis, 50 Id. 639; Hendricks v. Stark, 37 Id. 106. The only proper easement attached to a party-wall is the easement of support. This would give no right to the unobstructed use of the fine by appellant. The conveyance from Crighton to appellant of the north lot, contains no express grant of such a right. Was it acquired by implied grant under that conveyance? The rule of the common law upon the subject is that where the owner of two heritages or of one beritage, consisting of several parts, has arranged and adapted these so that one derives a benefit or advantage from the ether of a continuous and obvious character, and he sells one of them without making mention of those incidental advantages or burdens of one in respect to the other, there is in the silence of the parties an implied understanding and agreement that these. advantages and burdens, respectively, shall continue as before the

separation of the title; Washb. Basements 58; Morrison v. King, 62 III. 80; Lampman v. Milks, 21 N. Y. 505; Jones v. Jonkins, 11 Am. Law Reg. N. S. 24, s. c. 34 Md. 1. It may be noted that the deed here from Crighton to Ingale specifically conveyed the house, as well as the north lot.

Were the question between Crighton and Ingals, the equity of the latter to restrain Crighton's interruption of the use of the flue by Ingals, circumstanced as the flue is with respect to the beneficial enjoyment of the house, would be plain.

In order that an easement should pass in the manner as above named, by implication under the grant of an estate, it must be one that is apparent, as well as necessary and continuous. We regard the easement here claimed by appellant of the uninterrupted use of this flue as continuous and necessary to the beneficial enjoyment of his house, and the only serious question with us, as to the claim of this easement against the grantee of Crighton of the south let, Mrs. Plamondon, is whether the easement was an apparent one at the time of her purchase. There is no evidence in the record that at the time she had any actual notice or knowledge that any fine in the party-wall was being, or had been used by appellant for any purpose. To affect her the easement must have been obvious and apparent to any observer. An apparent sign of servitude must have existed on the part of the premises she purchased in favor of those of appellant, or as expressed by some of the authoritide, the marks of the burden must have been open and visible; Bufterworth v. Crauford, 46 N. Y. 849; Washb. Ecomonts 60, 88.

At the time of Mrs. Plamondon's purchase the entire south side of the south wall of appellant's house stood exposed to view, the projection forming the flue stood out from the wall proper, some eight inches, with the chimney thereon, and rested visibly on the land she purchased. We are of opinion that the encoment claimed in the use of this flue by appellant was indicated by the condition of the premises, that it was obvious and apparent to any observer, that there were apparent signs of the servitude, and that the works of the burden were open and visible, so as to satisfy the requirements of the authorities in such respect. It is admitted that the projection in the wall indicated there was a flue there, but it is said that as it was on the south side of the wall it might have been taken as an indication that it was put there for the benefit of the building, which might afterward be erected and joined on the wall;

but we think such would be a forced inference, that the reasonable conclusion should be that the flue was constructed for the use of the building of which it constituted a part, and that the wall was to be used and enjoyed by the adjoining proprietors as a partywall, in the condition which it was then in so far as respected this flue. The decree dismissing the bill will be reversed and the cause remanded for further proceedings consistent with this opinion.

Docree reversed.

Where a right or privilege is claimed as being annexed to one's land to use the adjacent property of another for a special purpose, whether arising by grant or reservation express or implied, or by prescription, the existence of the alleged encement or servicule will, in general, depend upon an affirmative answer to the inquiry, is it apparent, continuous and necessary? In the principal case, the only serious question with the court was whether the easement claimed in the five was apparent, there being no evidence before the court that, at the time of the purchase of the ground on which stood the portion or projection of the party-wall containing the fine, the purchaser, against whom the easement was cinimed, had any actual notice or knowledge that any five in the partywall was being or had been used for any purpose.

There is considerable conflict in the edjudged cases as to what are sufficleat marks or signs to charge those dealing with the premises with notice of the existence of an eastment or servitude. The conclusion arrived at by the court, in the foregoing case, that the projection in the wall, surmounted by a chimney-top, farnished sufficient signs of the servicule, is in harmony with the weight of authority. The marks of the burden were sufficiently open and visible for the purchaser of the servious tenement to have ascertained readily, by reasonable inspection of the premises, at the time of her purchase, the existence and extent of the burden charged

thereon by the use of the fine. That there should be any doubt in the mind of the court as to whether the easement claimed was of such obvious character as to satisfy faily the authorities in that respect, might be a matter of remark. in view of the apparently unqualified approval which the same court, in the recent well-considered case of Morrison v. King, 62 III. 30, gave to Pger v. Carter, 1 Huri. & Nor. 916, and several kindred leading cases, both English and American, if, indeed, the court in that case really intended to adopt Pper v. Certer without qualification. In some of the races approved by the court in Morrison v. King, the "marks" or "signs of servitude" were less open and visible than were there in the principal case; yet Mr. Justice McAzaga-TER, in delivering the opinion, says that "those cases" (including Pper v. Carter) * * * " embody a current of autherity, holding that an easement may be created by the disposition made of the promises by the ewner of the estate, and that, upon a severance of the title, the then owners will take their respective shares as they existed in the hands of the foreser comer. 11

Pyer v. Certer was the ease of a drain constructed under two houses by the owner thereof, it taking the water from both, and the owner afterwards conveyed the houses to separate purchasers. It was not proven that the purchaser of the servicus tonement, at the time of his purchase, knew of the position of the drain, but it was held "that he most

here known, or ought to have known, that some drainage there existed; and if he had inquired, he would have known of this drain." It will be observed that the purchaser of the services heritage not only had no notice or knowledge of the existence of the drain. except what he was presumed to have from his ordinary experience in regard to the flow of water and the necessity of drainage in towns; also, that there were no visible signs of the drain; but his presumed experience or observation in relation to drainage in general unset put him upon inspection of the premises he was about to deal with, to ascertain whether or not there was a drain in use connected with it and the adjoining tentment; he was bound to make inquirg. It is a reasonable inference from the report of the case, that there were no apparent signs of the drain, in the sense employed in the principal case. If, therefore, Pyer v. Certer is sound law on this point, "apparent signs of servitude" are not only those indications which are obvious to the natural eye upon a casual examination of the premises and surroundings, but the same may mean simply such facts as should be presumed to exist by a mind of ordinary experience in respect to privileges usually appurtenant to similarly-compled premises, to which experiones a party dealing with premises most recur, as the basis of an inquiry, whether or not the same is subject to some incident not openly visible, but accessorial to the benedicial use and enjoymout of the adjacent land by its owner. If that case is intended to go as for as, by the language employed in the decision it seems to go, its nutbority in this respect has been justly questioned, and it is doubtful whether the court, in Morrison v. King, supra, meant to adopt, unqualifiedly, the destrine of Pyer v. Certer, so for as to hold that any other signs of a servitude are suff-

cloud to charge a purchaser with notice thereof then such as are "obvious and apparent to any observer."

In Butterworth v. Crossford, 46 M. Y. 349, which the court is the principal case has referred to with approval, the leading authorities were cited quite fully in argument by council for the parties, RAPALLO, J., in deciding the case, says t " In the case of Pyer v. Carter, 1 Hurl. & Nor. 916, which was much rolled used on the ergament, and in the opinion of the learned court below, the dominant and servious tenoment had been originally one house. This bosse had been divided into two parts. The drainage was of the water which fell upon the roof, and it may well be, that the streetion and arrangement of the building were such as to indicate that some drain necessarily existed as an appartenent to the house, and that, upon the division of the house into two parts, that drain became common, and afforded drainage for both of the parts through one of them. * * * In Washburn on Resomonte (2d ed., p. 66), the learned auther, after reviewing the cases on this subject, states that he considers the dectrine of Pyer v. Carter confined to cases where a drain is necessary to both houses. and the owner makes a common drain for both; and this arrangement is apparent and obvious to an observer. M Pper v. Certer goes further then that, or, at all events, if it applies to eases where there is no apparent mark or sign of the drain, it is not in accordance with the current of the authorities."

There are other cases decided by Jearned courts which disapprove of Pyer Certer, such as Dodd v. Burchell, 1 H. & C. 113; Suffeld v. Brown, 10 Juris. N. S. 111; and Randell v. McLaughlin, 10 Allen 304, &c. Some of the discenting cases—aspecially these in Mareachusetts—principally discent from so much of the feedsien in Pyer v. Certer as held that, "the amount to be an

needed in the alteration of the drainage, or in constructing a new system of drainage, is not to be taken into consideration, for the meaning of the word 'necessity' is to be understood the neceselty at the time of the conveyance, and as matters then stood, without alteration." But the Supreme Court of Illisois adhered to and adopted the same rule in Morrison v. King, saying that the position assumed by counsel "that whatever of the alleged easement she (Mrs. King) could restore or supply by reasonable labor or expense, she was board to supply or do without, is supported neither by principle or authoalty." thus rejecting the authority of the Massachusette cases announcing a different rule.

In the American Law Register for January 1865 (Vol. IV., N. 8., p. 134), may be found an able and interesting eriticism by Judge REDFIELD of Pyer v. Carter, and his estimate of its value as authority, particularly on the points thereof discented from by the Lord Chanceller in Suffield v. Bressn.

The element of actual apparentness is by the best-accepted authorities promineatly heat in view in determining the existence and extent of an alleged seasmont; thus in Jones v. Jenkins, 11 Am. Law Rog. N. S. 24; s. c., 34 Md. 1, ALVEY, J., says: "Whenever an owner has erected and annexed peculiar qualities and incidents to different parts of his estate (and it matters not whother it be done by himself or his tenant by his authority), so that one portion of his land becomes visibly dependent upon another for the supply or secape of water, or the supply of light and sir, or for means of access, or for beneficial use or escapation, and he grants the part to which such incidents are armened, those jucidents thus plainly attached to the part granted, and to which another part is made serviout, will pass to the grantee as accessorial to the beneficial use

and enjoyment of the land." In Lampman v. Milks, 21 N. Y. 805, the Court of Appeals decided that, where the owner of land has by any artificial arrangement created an advantage for one portion to the burdening of the other, upon a severance of the ownership, the holders of the two portions take them respectively charged with the servitude, and entitled to the benefit openly and visibly attached at the time of conveyance of the portion Arst granted. See also Washburn on Easements and Servitudes, ch. 1, 2 3, and Kongon v. Nichole, 1 R. I. 412; Phillips v. Phillips, 48 Penna. St. 178: Durel v. Boisblanc, 1 La. Ann. 407: Cleris v. Tieman, 15 Id. 316; Robeson v. Maswell, 2 N. J. Eq. 57.

The court in the principal case does not hold that the easement in the flue was necessarily such because it happened to exist as constructed, in the wall which upon the severance of the estate became a party-wall between the two owners. as the only proper essement attached to a party-wall as such is that of support. This is sustained by Brooks v. Curtic, 50 N. Y. 639; Hendricks v. Stark, 87 14. 106; and Partridge v. Gilbert, 18 Id. 601, cited by the court. The right to use the well as a party-wall was not involved. That had been determined by the express contract between the parties. But other privileges may exist by reason of artificial arrangements in some way pertaining to a wall used as a party-wall, which do not arise out of its use strictly as a party-wall; thus a right of way, or the means for the supply or escape of air or water through a well, or the right to facton clothes-lines or to nail trees to a wall, or to use another's chimney for the conveyance of smoke: Goddard on Essements 55; Herrey v. Smith. 22 Beav. 299.

As the growth of cities and towns in this country is rapid and unparalleled, so the law of ensements and servicules, more and more, year by year, affects disectly the conflicting rights of vest numbers of the people. Every new adjudication which determines authoritatively some unsettled point in the lenbecomes therefore of luterest, not only to the litigant parties, but also to the profession and the people at large.

FRANK J. CRAWSONS.

Supreme Court of New Jersey.

MARTIN t. THE PRANKLIN FIRE INSURANCE CO.

On a policy of insurance against loss by fire, under seal, issued to the evener of the property, in which the insurer covenants to make good unto the insured, his executors, administrators or assigns, all such damage or loss as might happen, de., the owner may sue in his own name, although it may be written on the face of the policy: "Loss, if any, payable to A. B., as mortgages."

The direction on the policy to pay to the mortgages is not an assignment of the policy. Its logal effect is that of a direction in advance as to the mode of payment, which, when made, is performance in the manner agreed to by the lactual.

Under such a direction, if assented to by the insurer, the person in whose force the appointment is made acquires equitable rights, which the lastrer is bound to regard; but the contract with the insured is not thereby merged or extinguished.

In on action on such a policy in the name of the incured, if the incurer has pull the insurance-money to the mortgages, he may plead such payment as performance, and the rights of the mortgages can be protected, and the insurer abtain indemnity against a subsequent suit by the mortgages by the payment of the managints court.

DEMURER to declaration. The action was brought on a policy of insurance against loss by fire, issued by the defendants to the plaintiff, on premises in Jersey City. The policy was under each and is dated April 27th 1870. The loss occurred in Esptember of the same year.

Kingman, for the demurrer.

J. B. Vredenburgh, contra.

The opinion of the court was delivered by

DEPUE, J.—The ground of demurrer is that the action was improperly brought in the plaintiff's name. To sustain the descurrer the defendants rely on an averment in the declaration, that "on the 80th day of May 1870, by a certain measurandum written on the face of said policy of imprance, and subscribed by the said defendants, it was agreed as follows, to wit: "Loss, if any, payable to Garret G. Vreeland, as mertgages." On this averment the contention is that the action is maintainable only in the name of Vreeland.

In Hillyard v. The Mutual Benefit Inc. Co., 6 Vroom 416, this court held, that where a person takes a policy on his life, payable at his death to a third person, if it be in the form of a simple contract, action may be brought on it by the party having the beneficial interest. This case was affirmed on error: 8 Vroom 444. Indeed, it may be stated, as a general rule, that on a life-policy, where the money to become due under it, is payable to certain persons named as beneficiaries, the policy and money payable thereunder belong, the moment it is issued, to the persons designated, and they are the proper parties to receipt for the money. and see on the policy. The legal representatives of the insured have no claim upon the money, and cannot maintain an action therefor, if it be expressed to be for the benefit of some one else: Bliss on Life Ins., § 817. This rule is founded on the fact that a life-policy is a wager-policy: it is a mere contract to pay the stipulated sum on the death of a named individual, in consideration of the payment of the premiums reserved during his life. An interest in the life insured is not necessary to give validity to the contract: Trenton Mutual Life v. Johnson, 4 Zab. 576; Dalby v. India, Ac., Co., 15 C. B. 865. The rights and obligations of the parties, therefore, are determined by the form of the contract. If by the terms of the policy the money is payable to a third person, such person has the sole and exclusive interest in the insurence.

A contract of incurance against loss by fire is a different thing. It is a contract of indemnity, which requires an insurable interest in the property to give it validity. The owner, who obtains the incurance, pays the premium and takes a policy in his own name. is the party insured, although in case of a loss, payment is to be made to a third person: Senford v. The Mechanics' Inc. Co., 12 Cush. 541. If the person to whom the loss is made payable be a mertanges, the contract, nevertheless, is with the ewner for the incurance of his property, and not with the mortgagee for the insurance of his interest: Greevener v. The Atlantic Inc. Co., 17 M. Y. 301: Bidwell v. The N. W. Inc. Co., 19 N. Y. 179. To treat the policy of insurance under such circumstances as a contract exclusively with the mortgages, would lead to results in plain violation of the intention of the parties. On such a contract the measure of liability is the payment of the mortgage-money, and on narmont thereof the insurer will be remitted to the mortgages's lien on the mortgaged premises for indomnity: Insurance Co. v. Woodruff, 2 Dutcher 542.

In the present case, in the body of the policy the defendants expressly covenant, in consideration of the premium paid, to make good and satisfy unto the insured, his executors, administrators or assigns, all such damage or loss as might happen to the property insured, within the period for which the policy was issued. is the contract between the parties. The direction to pay the sum in which the insurance was effected to the mertgages, in case of a loss, is collateral to the principal contract, and is not an assignment of the policy. The legal effect of such a clause, in favor of a third person in a policy in terms between the insurer and the owner, is that of a direction is advance as to the mode of payment, which when made is performance of the contract in the manner assented to by the insured, and discharges the obligation pre tente. This view of the nature of a clause of this kind in a policy is expressed by SHAW, C. J., in Fogg v. Middleses Inc. Co., 10 Cush. 846; by Bigslow, J., in Hale v. Mechanics' Inc. Co., 6 Gray 172; by DEWEY, J., in Loring v. The Manufacturers' Inc. Co., 8 Gray 29; and by AMES, J., in Turner v. Quincy Inc. Co., 100 Mass. 578.

Under such a direction, if assented to by the insurer, the person in whose favor the appointment is made, acquires equitable rights which the insurer is bound to regard, but the contract with the insured is not thereby merged or extinguished. If the appointment he in favor of a mortgage it will not operate pre-tente as an extinguishment of the mortgage-debt. The mortgage may be content with the security of the remaining property included in his mortgage, or with his remedy on the bend. The interest of the owner in the property and in having the mortgage-debt satisfied remains, notwithstanding the direction in the policy to pay the insurance money to the mortgages in case of a less. The interest so remaining in the owner is an insurable interest, for the protection of which he may resert to his contract with the insurer.

It has accordingly been held, that on a policy in which the insurer "caused C. & L. for the owners, payable to C. & L." to be insured, an action might be maintained in the name of the owners with the consent of C. & L. (Farrer v. The Commenceath Inc. Co., 18 Pick. 58), and that the owner who insures his property by

a policy payable to a mortgagee, in case of loss, might maintain an action on the policy in his own name by the consent of the mortgagee, and that such consent may be shown at the trial or even before judgment entered: Jackson v. Farmer Ins. Co., 5 Gray 52; Turner v. Quincy Ins. Co., 109 Mass. 568.

In my judgment, a broader principle even may be adopted than was recognised in these cases, and the rule be affirmed on sound legal principles, that an action may be maintained in the name of the party with whom the contract was made, with or without the consent of the person in whose favor the appointment is made, in all cases where an ineurable interest remains in such party. Devie v. Boardman, 12 Mess. 80, the policy stated that the plaintiff D., "or his agent," made insurance, &c., it appearing that the incurance was made for the benefit of the plaintiff, and another joint-owner, and he was allowed to recover the whole loss in his own name for the use of himself and the other joint-owner. Word v. Wood, 18 Mass. 589, the declaration alleged that the policy was made to the plaintiff, as well for C. S. as himself, in certain proportions. It was objected that C. S. should have joined in the action; and was held by the Court, that "it was in conformity with the contract that the plaintiff should maintain the action in his own name," and that the action was well brought without joining C. S.

In Rider v. Ocean Ins. Co., 20 Pick. 259, the policy on a vessel was issued to the plaintiff, for whom it might concern, loss payable to a third person who was mortgagee; the property was the property of the plaintiff and two others. An action in the name of the plaintiff was held to be correctly brought, the Court saying that "the suit would have been properly commenced in his own name, even if he had never been interested in the vessel; but in such case be should have averred and proved for whose account the policy was made, and in whom the interest at the time of the less really was." In Ketchem v. Protection Inc. Co., cited in Digest of Insurance Cases, 1 Allon (N. Bruns.) 186, the insurers concented, by an endorsement on the policy, that the loss should be payable to W., and it was held that such endorsement did not proclude the assered from maintaining an action in his own name. In a mutual company, on a policy "Loss payable to," &c., the action must be brought in the name of the party to the policy who gives the premium acts, and thereby becomes a member of the company: Nevins v. Rockingham Inc. Co., 5 Feeter (N. H.) 22, Toloon v. Belknap County Inc. Co., 19 Id. 281.

I am aware that there are dicts and cases to the contrary effect, but they will be found, in the main, to be cases where the incured had parted with his insurable interest, or made a regular nesignment of the policy, which had been ratified by the insurer, under its charter or by-laws, or the question has been as to the right of the person to whom the insurance money is appointed to be paid, to see in his own name.

Where the party with whom the contract of insurance is expressly made, has still an insurable luterest to be protected by the policy, and has not assigned it by a legal assignment, it is sensistent with settled legal principles, to give him a right of action on the policy in his own name. In such an action, if the insurance mency be wholly unpaid, the recovery will be for the entire interest in the policy, without regard to the mortgage. No injury will result from such a procedure to any of the parties concerned. If the insurar has paid the money to the mortgagee, he may plead the payment as performance.

The breach assigned in the declaration that the defendant "has not paid or made good the plaintiff's loss or any part thereof, either to the plaintiff or to the said Garret Vreeland," tenders such an issue. The rights of the mortgages can also be pretected, by payment of the money into court, and the insurer may obtain indemnity against any subsequent suit by the mortgages, by the section of the court into which the money is paid. If actions he pending at the same time by the owner and the mortgages, the court, under its equitable powers, can so control the litigation that no injustice will be done.

The demarrer should be everrulated

Supreme Court of the United States. MARIE A. N. POLLARD v. JACOB LYON.

In the absence of any statute making fernication indictable, words imputing sexual intercourse to a woman are not actionable in themselves, unless this is married, and a declaration which does not aver that she is married, falls to set forth any cause of action.

The averment that thereby the plaintiff was "demaged and injured in her name and fame" is not a sufficient averment of special demage.

To support an action of slander the words must be: 1. Words fairely spokes

of a person, which impute to the party the commission of some oriminal offence involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. 2. Words falsely spuken of a person, which impute that the party is infected with some contagious disease, where, if the charge is true, is would exclude the party from society. 8. Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an effice or employment of profit, or the want of integrity in the discharge of the duties of such an effice or employment. 4. Defamatory words falsely spoken of a party, which prejudice such party in his or her profession or trade. 8. Defamatory words falsely spoken of a person, which, though not in themselves actionable, escasion the party special damage.

Ennon to the Supreme Court of the District of Columbia. Slander. The case is sufficiently stated in the opinion of the court, which was delivered by

CLIFFORD, J.—Words, both false and slanderous, it is alleged, were spoken by the defendant of the plaintiff, and she suce in an action on the case for slander, to recover damages for the injury to her name and fame.

Controversies of the kind, in their legal aspect, require pretty careful examination, and in view of that consideration it is deemed proper to give the entire declaration exhibited in the transcript, which is as follows: "That the defendant, on a day named, speaking of the plaintiff, falsely and maliciously said, speke, and published of the plaintiff the words following: 'Isaw her in bed with Captain Denty.' That at another time, to wit, on the same day, the defendant falsely and maliciously spoke and published of the plaintiff the words following: 'I looked ever the transom-light and saw Mrs. Pollard,' meaning the plaintiff, 'in bed with Captain Denty,' whereby the plaintiff has been damaged and injured in her name and fame, and she claims damages therefor in the sum of ten thousand dollars."

Whether the plaintiff and Captain Denty are married or single persons does not appear, nor is it alieged that they are not husband and wife, nor in what respect the plaintiff has suffered loss beyond what may be inferred from the general averment that she had been damaged and injured in her name and fame.

Service was made and the defendant appeared and pleaded the general issue, which being joined, the parties went to trial and the jury, under the instructions of the court, found a verdict in favor of the plaintiff for the whole amount claimed in the declaration. Hence of the other preceedings in the case, at the special term,

require any notice, except to say that the defendant filed a motion in arrest of judgment, on the ground that the words set forth in the declaration are not actionable, and because the declaration does not state a cause of action which entitles the plaintiff to recover, and the record shows that the court ordered that the motion be heard at general term in the first instance. Both parties appeared at the general term and were fully heard, and the court sustained the motion in arrest of judgment, and decided that the declaration was bad in substance. Judgment was subsequently rendered for the defendant and the plaintiff sued out the present writ of error.

Definitions of alander will afford very little aid, in dispesing of any question involved in this record, or in any other, ordinarily arising in such a controversy, unless where it becomes necessary to define the difference between oral and written defamation, or to prescribe a criterion to determine, in cases where special damage is claimed, whether the pocuniary injury alleged, naturally flows from the speaking of the words set forth in the declaration. Different definitions of slander are given by different commentators upon the subject, but it will be sufficient to say that oral slander, as a cause of action, may be divided into five classes, as follows: 1. Words falsely spoken of a person, which impute to the party the commission of some criminal offence involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. 2. Words falsely spoken of a person, which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society. 2. Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. 4. Defamatory words falsely spoken of a party, which projudice such party in his or her profession or trade. 5. Defamatory words falcely spoken of a person, which, though not in themselves actionable, occasion the party special damage.

Two propositions are submitted by the plaintiff to show that the court below erred in sustaining the motion in arrest of judgment, and in deciding that the declaration is bad in substance: 1. That the words set forth in the declaration are in themselves actionable and consequently that the plaintiff is entitled to recover, without aver-

ring or proving special damage. 2. That if the words set forth are not actionable per se, still the plaintiff is entitled to recover under the second paragraph of the declaration, which, as she insists, contains a sufficient allegation that the words spoken of her by the defendant were, in a pecuniary sense, injurious to her, and that they did operate to her special damage.

• Certain words, all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage, as if they import a charge that the party has been guilty of a criminal offence involving moral turpitude, or that the party is infected with a contagious distemper, or if they are prejudicial, in a pecuniary sense, to a person in office or to a person engaged as a livelihood in a profession or trade, but in all other cases the party whe brings an action for words must show the damage he er she has suffered by the false speaking of the other party.

Where the words are intrinsically actionable, the inference or presumption of law is that the false speaking occasions loss to the plaintiff, and it is not necessary for the plaintiff to aver that the words alleged amount to the charging of the described offence, for their actionable quality is a question of law and not of fact, and will be collected by the court from the words alleged and proved, if they warrant such a conclusion.

Unless the words alleged impute the offence of adultery, it can hardly be contended that they impute any criminal offence, for which the party may be indicted and punished in this district, and the court is of the opinion that the words do not impute such an offence, for the reason that the declaration does not allege that either the plaintiff or Captain Denty was married at the time the words were spoken. Support to that view is derived from what was shown at the argument, that fornication as well as adultery was defined as an offence by the provincial statute of the 3d of June 1715, by which it was enacted that persons guilty of those offences, if convicted, should be fined and punished as therein provided: Kilty's Laws, ch. 27, secs. 1, 2.

Beyond all doubt offences of the kind involve moral turpitude, but the second section of the act, which defined the offence of fernication, was, on the 8th of March 1785, repealed by the legislature of the state: 2 Id., ch. 47, sec. 4.

Sufficient is remarked to show that the old law of the province,. defining such an offence, was repealed by the law of the state

years before the territory, included within the limits of the city, was ceded by the state to the United States, and inacmuch as the court is not referred to any later law passed by the state, defining such an offence, nor to any act of Congress to that effect, passed since the cession, our conclusion is that the plaintiff fails to show that the words alleged impute any criminal effence to the plaintiff for which she can be indicted and punished.

Suppose that is so, still the plaintiff contends that the words alleged, even though they do not impute any criminal offence to the plaintiff, are nevertheless actionable in themselves, because the misconduct which they do impute is derogatory to her character and highly injurious to her social standing.

Actionable words are doubtless such as naturally imply damage to the party, but it must be borne in mind that there is a marked distinction between slander and libel, and that many things are actionable when written or printed and published, which would not be actionable if merely spoken, without averving and proving special damage: Clement v. Chivis, 9 B. & C. 174; McClary v. Rose, 5 Binney 219.

Unwritten words, by all or nearly all the modern authorities, even if they impute immoral conduct to the party, are not actionable in themselves, unless the misconduct imputed amounts to a criminal offence, for which the party may be indicted and punished. Judges as well as commentators in early times experienced much difficulty in extracting any uniform definite rule from the old decisions in the courts of the parent country, to guide the inquirer in such an investigation; nor is it strange that such attempts have been attended with so little success, as it is manifest that the incongruities are quite material, and in some respects, irresemble-ble. Nor are the decisions of the courts of that country, even of a later period, entirely free from that difficulty.

Examples both numerous and striking, are found in the reported decisions of the period last referred to, of which only a few will be mentioned. Words, which of themselves are actionable, said Lord Holl, must either endanger the party's life or subject him to informous punishment; that it is not enough that the party may be fined and imprisoned, for a party may be fined and imprisoned for a common trespass, and none will hold that to say one has committed a trespass will bear an action; and he added that at locat the thing charged must "in itself be scandalous." Option v. Therefore the charged must "in itself be scandalous."

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pended in the alteration of the drainage, or in constructing a new system of drainage, is not to be taken into consideration, for the meaning of the word "messasity" is to be understood the neceselty at the time of the conveyance, and so matters then stood, without alteration." But the Supreme Court of Illinois adhered to and adopted the same rule in Morrison v. King, saying that the position assumed by counsel "that whotever of the alleged easement she (Mrs. King) could restore or supply by reasonable labor or expense, she was board to supply or do without, is supported neither by principle or authostry," thus rejecting the authority of the Massachusette cases announcing a different rule.

In the American Law Register for January 1865 (Vol. IV., N. S., p. 134), may be found an able and interesting eriticism by Judge REDFIELD of Pyer v. Carter, and his estimate of its value as authority, particularly on the points thereof discented from by the Lord Chanceller in Suffield v. Brown.

The element of actual apparentness is by the best-accepted authorities prominently kept in view in determining the existence and extent of an alleged easemont; thus in Jones v. Jenkins, 11 Am. Law Rog. N. S. 24; s. c., 34 Md. 1, ALVEY, J., says: "Whenever an owner has erected and annexed peculiar qualities and incidents to different parts of his estate (and it matters not whother it be done by himself or his tenant by his authority), so that one portion of his land becomes visibly dependent upon another for the supply or escape of water, or the supply of light and air, or for means of access, or for beneficial use or escapation, and he grants the part to which such incidents are annexed, those jucidents thus plainly attached to the part granted, and to which another part is made servicest, will pass to the grantee as accessorial to the beneficial use

and enjoyment of the land." In Lampman v. Milks, 21 N. Y. 805, the Court of Appeals decided that, where the owner of land has by any artificial arrangement created an advantage for one portion to the burdening of the other, upon a severance of the ownership, the holders of the two pertions take them respectively charged with the servitude, and entitled to the benefit enough and visibly attached at the time of conveyance of the portion Arst granted. See also Washburn on Easements and Servitudes, ch. 1, 2 3, and Kongon v. Nichols, 1 R. I. 412; Phillips v. Phillips, 48 Penna. St. 178: Durel v. Boisblanc, 1 La. Ann. 467; Clerio v. Tieman, 15 Id. 316; Roboson v. Maxwell, 2 N. J. Eq. 57.

The court in the principal case does not hold that the easement in the fine was necessarily such because it happened to exist as constructed, in the wall which moon the severance of the estate became a party-wall between the two owners, as the only proper essement attached to a party-wall as such is that of support. This is sustained by Brooks v. Curtis, 50 N. Y. 639; Hendricks v. Stark, 87 14. 106; and Partridge v. Gilbert, 18 14. 601, cited by the court. The right to was the well as a party-wall was not involved. That had been determined by the express contract between the parties. But other privileges may exist by reason of artificial arrangements in some way pertaining to a wall used as a party-wall, which do not arise out of its use strictly as a party-wall; thus a right of way, or the means for the supply or escape of air or water through a wall, or the right to factor clother-lines or to nail trees to a wall, or to use another's chimney for the conveyance of smoke: Goddard on Easements \$5; Hersey v. Smith. 22 Beav. 299.

As the growth of cities and towns in this country is rapid and unparalleled, as the law of easements and servitudes, more and more, year by year, affects directly the conflicting rights of vast numbers of the people. Every new adjudication which determines authoritatively some unsettled point in the less to the litigant parties, but also to the profession and the people at large.

FRANK J. CRAWFORD.

Supreme Court of New Jeroey.

MARTIN r. THE FRANKLIN FIRE INSURANCE CO.

On a policy of insurance against loss by fire, under seal, issued to the evener of the property, in which the insurer covenants to make good unto the insured, his executors, administrators or assigns, all such damage or loss as might happen, &c., the owner may sue in his own name, although it may be written on the face of the policy: "Loss, if any, payable to A. B., as mortgages."

The direction on the policy to pay to the mortgages is not an assignment of the policy. Its legal effect is that of a direction in advance as to the mode of payment, which, when made, is performance in the manner agreed to by the lastred.

Under such a direction, if assented to by the insurer, the purson in whose favor the appointment is made acquires equitable rights, which the lastrer is bound to regard; but the contract with the insured is not thereby merged or extinguished.

In an action on such a policy in the name of the insured, if the insurer has paid the insurance-money to the mortgages, he may plead such payment as performance, and the rights of the mortgages can be protected, and the insurer obtain indemnity against a subsequent suit by the mortgages by the payment of the managints court.

DEMURRER to declaration. The action was brought on a policy of insurance against loss by fire, issued by the defendants to the plaintiff, on premises in Jersey City. The policy was under each and is dated April 27th 1870. The loss occurred in Esphember of the same year.

Kingman, for the demurrer.

J. B. Vredenburgh, contra.

The opinion of the court was delivered by

DEPUE, J.—The ground of demurrer is that the action was improperly brought in the plaintiff's name. To sustain the descurrer the defendants rely on an averment in the declaration, that "on the 80th day of May 1870, by a certain measurandem written on the face of said policy of imperance, and subscribed by the said defendants, it was agreed as follows, to wit: "Loss, if any, payable to Garret G. Vreeland, as mortgages." On this averment the contention is that the action is maintainable only in the name of Vreeland.

Devey, 5 Cowen 508; Alexander v. Same, 9 Wend. 141; Young v. Miller, 8 Hill 22; in all of which the same rule is applied.

Other cases equally in point are also to be found in the reported decisions of the courts of that state, of which one or two more only will be referred to: Bissell v. Cornell, 24 Wend. 854. In that case the words charged were fully proved, and the defendant moved for a non-suit, upon the ground that the words were not in themselves actionable, but the circuit judge overruled the motion and the defendant excepted. Both parties were subsequently heard in the Supreme Court of the state, Nelson, C. J., giving the opinion of the court, in which it was held that the words were actionable, and the reason assigned for the conclusion is that the words impute an indictable offence involving moral turpitude.

Defauatory words, to be actionable per se, say that court, must impute a crime involving moral turpitude punishable by indictment. It is not enough that they impute immorality or moral dereliction merely, but the offence charged must be also indictable. At one time, said the judge delivering the opinion, it was supposed that the charge should be such as, if true, would subject the party charged to an infamous punishment, but the Supreme Court of the state refused so to hold: Widrig v. Oyer, 13 Johns. 124; Wright v. Page, 3 Keyes 582.

Subject to a few exceptions it may be stated that the courts of other states have adopted substantially the same rule, and that most of the exceptional decisions are founded upon local statutes defining fernication as a crime, or providing that words imputing incentinence to an unmarried female, shall be construed to impute to the party actionable misconduct.

Without the averment and proof of special damage, says SHAW, C. J., the plaintiff, in an action on the case for slander, must prove that the defendant uttered language the effect of which was to charge the plaintiff with some crime or offence punishable by law:

Dunnell v. Fields, 11 Met. 552.

Speaking of actions of the kind, PARKER, C. J., said that words imputing crime to the party against whom they are spoken, which, if true, would expose him to disgraceful punishment, or imputing to him some foul and loathsome disease, which would expose him to the loss of his social pleasures, are actionable, without any special damage. While words perhaps equally offensive to the individual, of whom they are spoken, but which impute only some

defect of moral character, are not actionable, unless a special damage is averred, or unless they are referred, by what is called a collequium, to some office, business, or trust which would probably be injuriously affected by the truth of such imputations: Chadden't v. Brigge, 18 Mass. 252.

Special reference is made to the case of Miller v. Parrial. 8 Pick. 885, as authority to support the views of the plainth, but the court here is of the opinion that it has no such tendency. What the court in that case decided is, that whenever an effects is imputed which, if proved, may subject the party to punishment, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable, which is not different in principle from the rule laid down in the leading two-that if the charge be such that, if true, it will subject the party falsely accused to an indictment for a crime involving moral turpitude, then the words will be in themselves actionable.

Early in her history the legislature of that state defined the act of fornication as a criminal offence, punishable by a fine, and which may be prosecuted by indictment, and if the person tenvicted does not pay the fine, he or she may be committed to the common jail or to the house of correction. None of the counts in that case contained an averment of special damage, but the court held that inasmuch as the words alleged imputed a criminal effence which subjected the party to punishment involving diagraes, the words were actionable, and it is not doubted that the decision is correct. Exactly the same question was decided by the same court in the same way twenty-five years later: Kenney v. Lough-lin, 8 Gray 5; 1 Stats. Mass. 1786, 298.

That the words uttered import the commission of an offince, say the court, cannot be doubted. It is the charge of a eximal unishable by law and of a character to degrade and diagrace the plaintiff and exclude her from society. Though the imputation of crime, said BIGKLOW, J., is a test, whether the words spouds do amount to legal slander, yet it does not take away their activable quality if they are so used as to indicate that the party has and ferred the penalty of the law and is no longer exposed to the danger of punishment: Krebe v. Oliver, 12 Gray 242; Freeder v. December, 2 M. & Rob. 119.

Courts affix to words alleged as slanderous their ordinary meaning, consequently, says SHAW, C. J., when words are set firth as

having been spoken by the defendant of the plaintiff, the first question is whether they impute a charge of felony or other infamous crime, punishable by law. If they do, an innuende undertaking to state the same, in other words, is useless and superfluous, and if they do not, an innuendo cannot aid the averment, as it is a clear rule of law that an innuendo cannot introduce a meaning to the words broader than that which the words naturally bear, unless connected with proper introductory averments: Alexander v. Angle, 1 Crompt. & Jervis 148; Goldstein v. Feee, 2 Younge & Jervis 146; Carter v. Andrews, 16 Pick. 5; Beardeley v. Tappan, 2 Blatch. 588.

Other state courts, where the act of fornication is defined by statute as an indictable offence, have made similar decisions, but such decisions do not affect any question involved in this investigation: Vanderlip v. Roc, 28 Penna. St. 82; 1 Am. Lead. Cas. (5th (d.) 103; Simons v. Carter, 32 N. II. 459.

Much discussion of the cases decided in the Supreme Court of Pennsylvania is quite unnecessary, as we have the authority of that court for saying that the leading cases establish "the principle that words spoken of a private person are only actionable when they contain a plain imputation, not merely of some indictable offence, but one of an infamous character or subject to an infamous or disgraceful punishment, and that an insuende cannot alter, enlarge or extend their natural and obvious meaning, but only explain something already sufficiently averred, or make a more explicit application of that which might etherwise be considered ambiguous to the material subject-matter properly on the record, by the way of averment or collequium: Geoling v. Morgen, 82 Penna. St. 275; Shafter v. Kinster, 1 Binney 587; Meccury v. Rees, 5 Binney 218; Andrees v. Keppenheafer, 8 S. & R. 255.

State courts have, in many instances, decided that words are in themselves actionable whenever a criminal offence is charged, which, if proved, may subject the party to punishment, though not ignominious, and which brings diagrace upon the complaining party; but most courts agree that no words are actionable per es unless they impute to the party some criminal offence, which may be visited by punishment, either of an infamous character or which is enleulated to affect the party injuriously in his or her social atanding: Buck v. Hereng, \$1 Me. 558; Mills v. Wing, 10 B.

Monr. 417; Perdue v. Burnett, Minor 188; Demarcst v. Haring, 6 Cow. 76; Townsend on Slander, sec. 154; 1 Wendell's Starkie on Slander 48; Redway v. Gray, 81 Vs. 297.

Formulas differing in phraseology have been prescribed by different courts, but the annotators of the American Leading Cases say that the Supreme Court of the State of New York, in the case of Brooker v. Coffin, appear "to have reached the true principle applicable to the subject, and we are inclined to concur in that conclusion, it being understood that words falsely spoken of another, may be actionable per so when they impute to the party a criminal offence for which the party may be indicted and punished, even though the offence is not technically denominated infamous, if the charge involves moral terpitude, and is such as will affect injuriously the social standing of the party: 1 Am. Lead. Cas. (5th ed.) 98.

Decided support to that conclusion is derived from the English decisions upon the same subject, especially from these of modern date, many of which have been very satisfactorily collated by a very able text writer: Addison on Torts, 3d ed. 765. Slander, in writing or in print, says the commentator, has always been considered in our law a graver and more serious wrong and injury than slander by word of the mouth, inasmuch as it is accompanied by greater coolness and deliberation, indicates greater malice, and and is in general propagated wider and further than oral slander. Written slander is punishable in certain cases, both criminally and by action, when the more speaking of the words would not be punishable in either way: Villers v. Membey, 2 Wile. 408; Sewille v. Jerdine, 2 H. Bl. 582; Bac. Abr. Stander, B.; Keiler v. Sewford, 3 Cr. C. O. 190.

Examples of the kind are given by the learned commentator, and he states that verbal reflections upon the chastity of an unmarried female are not actionable, unless they have prevented her from marrying or have been accompanied by special damage; but if they are published in a newspaper, they are at once actionable, and substantial damages are recoverable: Bl. Com. 125 n. 6; Janese v. Stuert, 1 Term 784.

Comments are made in respect to verbal slander under several heads, one of which is entitled defamatory words not actionable without special damage, and the commentator proceeds to remark that many victures and abuse he word of month however store.

is not actionable unless it is spoken of a professional man or tradesman in the conduct of his profession or business. Instances of a very striking character are given, every one of which is supported by the authority of an adjudged case: Lumby v. Allday, 1 Crompt. & Jer. 801; Barnett v. Allen, 8 II. & N. 876.

Even the judges holding the highest judicial stations in that country have felt constrained to decide that to say of a married female that she was a liar, an infamous wretch, and that she had been all-but seduced by a notorious libertine, was not actionable without averring and proving special damage: Lynch v. Knight, 9 H. of L. Cas. 594.

Finally, the same commentator states that words imputing to a single woman that she gets her living by imposture and prostitution, and that she is a swindler, are not actionable, even when special damage is alleged, unless it is proved, and the proposition is fally sustained by the cases cited in its support: Welby v. Elston, 8 M., G. & S. 142; Addison on Torts, 8d ed. 788; Townsend on Stander, sec. 172, and note, 516, 517, 518.

Words actionable in themselves without proof of special damage, are next considered by the same commentator. His principal proposition under that head is that words imputing an indictable estimate are actionable per se, without proof of any special damage, giving as a reason for the rule that they render the accused person liable to the pains and penaltics of the criminal law. Beyond question the authorities cited by the author support the proposition and show that such is the rule of decision in all the courts of that country having jurisdiction in such cases: Heming v. Power, 10 Mess. & Wels. 570; Afred v. Farlow, 8 Q. B. 854; Edsall v. Ressell, 5 Scott N. R. 801; Brayne v. Cooper, 5 Mess. & Wels. 256; Barnet v. Allen, 8 H. & N. 878; Davice v. Solomon, 41 Law Jeur. Q. B. 11; Roberts v. Roberts, 5 Best & Smith 889; Perbine v. Scott, 1 H. & C. 158.

Examined in the light of these suggestions and the authorities eited in their support, it is clear that the proposition of the plaintiff, that the words alleged are in themselves actionable, cannot be examined.

Concede all that, and still the plaintiff suggests that she alleges, in the second paragraph of her declaration, that she "has been demaged and injured in her name and fame," and she contends that that averment is sufficient, in connection with the words

charged, to entitle her to recover as in an action of shader for defamatory words with averment of special damage.

Special damage is a term which denotes a claim for the negatile and proximate consequences of a wrengful act, and it is tadoubtedly true that the plaintiff in such a case may recover for defautatory words spoken of him or her by the defendant, even though the words are not in themselves actionable, if the declaration sets that such a claim in due form and the allegation is sustained by sufficient evidence, but the claim must be specifically set forth in order that the defendant may be duly notified of its nature and that the quart may have the means to determine whether the alleged special damage is the natural and proximate consequences of the defendant: Hadden v. Scott, 15 C. B. 429.

Whenever proof of special damage is necessary to maintain an action of slander the claim for the same must be set firth in the declaration, and it must appear that the special damage is the natural and proximate consequence of the words spoken, else the allegation will not entitle the plaintiff to recover: Visare v. Wilses, 8 East 8; Knight v. Gibbs, 1 Ad. & Ell. 48; Agre v. Crassa, 2 Ad. & Ell. 8; Roberts v. Roberts, 5 Best & Smith 389.

When special damage is claimed, to support such an action for words not in themselves actionable, the nature of the special less or injury must be particularly set forth, and it is not, the defendant may demur. He did demur in the case last cited, and COCKBURN, C. J., remarked that such an action is not maintainable, unless it be shown that the loss of some substantial or meterial advantage has resulted from the speaking of the words: Addison on Torts, 8d ed. 805; Wilby v. Elston, 8 C. B. 148.

Where the words are not in themselves actionable, because the offence imputed involves neither moral terpitude, nor subjects the offender to an infamous punishment, special desage until be alleged and proved in order to maintain the action: Hear v. Match, 23 Conn. 590; Andres v. Keppenhagfer, S. S. & R. 266; Buye v. Gillespie, 2 Johns. 117.

In such a case it is necessary that the declaration should set forth precisely in what way the special damage resulted from the speaking of the words. It is not sufficient to allege generally, that the plaintiff has suffered special damages or that the garty has been put to great costs and expenses: Cook v. Cook, 100 Mam. 194.

By special damage in such a case is meant pecuniary loss, but it is well settled that the term may also include the loss of substantial sospitality of friends: Moore v. Meagher, 1 Taunt. 42; Williams v. Hill, 19 Wend. 806.

Illustrative examples are given by the text writers in great numbers, among which are loss of marriage, loss of profitable employment or of emoluments, profits or customers, and it was very early settled that a charge of incontinence against an unmarried funcie, whereby she lost her marriage, was actionable by reason of the special damage alleged and proved: Davie v. Gardiner, 4 Co. 16 h., pl. 11: Reston v. Pomfreicht, Cro. Eliz. 689.

Doubt upon that subject cannot be entertained, but the special damage must be alleged in the declaration and proved, and it is not sufficient to allege that the plaintiff "has been damaged and injured in her name and fame," which is alleged in that regard in the case before the court: Hartley v. Herring, 3 Term 133: Addised on Torte 805; Beach v. Ranney, 2 Hill 809.

Tested by these considerations, it is clear that the decision of the court below, that the decision is bad in substance, is correct.

Judgment affirmed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES, 1
SUPREME COURT OF ILLINOIS. 1
SUPREME COURT OF WISCONSIN. 2

ACTION.. Bee Pereign Judgment.

Judgment—Interference by Rent party in Interest though not nominally on the Record—Statute of Linductions.—The real defendant who pays a judgment against a nominal party, afterwards vacated, may recover in his own name the mency so paid: Monn et al., v. The Bine Insurance Co., 38 Wis.

Plaintiffs covenanted with A., S. & Co., for value, to discharge all indebtedness and liabilities of the latter firm, indemnify it equiest on

[!] From J. W. Wallace, Esq., Reporter; to appear in vol. 22 of his Reports.

^{*} From Mon. N. L. Frommon, Beportor; to appear in vol. 60 lilitools Reports.

Prom Mon. G. M. Conover, Repertur ; to appear in 36 Wisconsta Reports.

action by the present defendant against it then pending in New York, and pay any judgment which should be rendered against it therein. On a judgment rendered against A., S. & Co. in that action, this defendant recovered a judgment in Wisconsin against that firm, which was paid by plaintiffs, but afterwards vacuted on their motion, for the reason that the New York judgment had been reversed. Hold, that such payment by plaintiffs was not a coluntery one, but one to which they were bound by their corrant; and they may recover from this defendant the amount so paid: M.

This action for such recovery was commenced more than six years after payment by plaintiffs of said Wisconsin judgment, but less than six years after the reversal of the New York judgment. Ifold, that it was not barred by the statute, the cause of notion not having accreed

until such reversal: M.

ADMIRALTY.

Submission of Litigated Matters to Arbitration—Prize.—Captors (Admiral Farragut and others) hering fied a libel in the admiralty for prime taken below New Orleans in April 1862, they and the government agreed to refer the cause to the "final determination and award" of A., B., and C., "the award of whom," mid the agreement of reference, "shall be final upon all questions of law and fact involved, said award to be entered as a rule and decree of court in said case, with the right also of either party to appeal to the Supreme Court of the United States, as from other decrees or judgments in prize cases." The arbitrators made an award, finding cortain matters wholly or chiefly of fact, and also certain conclusions of law, and their award was, after exceptions to it, made a decree of the court where the libel was fied. An appeal was taken to the Supreme Court.

Held as principles of law applicable to the case:--

1. That there was nothing in the nature of the admiralty jurisdiction or of an appeal in admiralty, which prevented parties in the Court of Admiralty, whother sitting in prize or as an instance court, from submitting their case by rule of court to arbitration.

3. That the award in the present case was to be esastrued here and its effect determined by the same general principles which would govern

it in a court of common law or of equity.

3. That notwithstanding the expression in the agreement of submission, that all questions of less in the case were to be concluded by the nward, the agreement was in this respect to more than a submission of all matters involved in the suit.

4. That accordingly where the award found facts, it was conclusive; where it found or announced concrete propositions of law, unmixed with facts, its mistake, if one was made, could have been corrected in the court below, and could be corrected here; that where a proposition was one of mixed law and fact, in which the error of law, if there was any, could not be distinctly shown. One parties must abide by the award.

5. That the award was also liable, like any other award, to be set saide in the court below, for such reasons as would be sufficient in other bourts; as for exceeding the power conferred by the submission, for manifest mistake of law, for freed, and for all other reasons on which awards are set saide in other courts of law or chancery: United States

v. Furregist, 22 Wall.

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AGENT.

Council test for both Buyer and Seller.—Where an agent employed to sell property, sells the same to a purchaser for whom he is acting as agent in effecting the purchase, the seller, in equity, may avoid the contract: Fish v. Lever, 69 Ills.

ARBITRATION AND AWARD. See Admiralty.

BANKBUPICY. . See Landlord and Tenant; Partnership.

Redemption of Land by Bankrupt after Sale for Taxes—Owner.—Under a statute which emacts that the "owner," may within a time named solesses land sold for taxes, a redemption may properly be made by a person who has been decreed a bankrupt, the lands having been his. In the case here before the court there had as yet been no appointment of an assignment, nor assignment and conveyance to such person, as provided for in the fourteenth section of the Bankrupt Act of 1867; and the redemption was made between the date of the decree and of such appointment: Hampton v. Rouse, 22 Wall.

A sharge that a person who had been decreed a bankrupt on his own application had by such decree ceased to be owner and had lost the right to redoom, Held to be erroneous; there having been evidence tending to

show a redemption by such a person: Id.

BILLS AND NOTES.

Promissory Note—Defence allowed where Plaintiff suce on Note as Trustee for another.—Where the plaintiff in an action on a promissory note is a more trustee for another, the maker may avail himself of any defence which he might set up against the real owner if the action had been brought in his name: Belokradsky v. Kuhn, 69 Ills.

CONSTITUTIONAL LAW.

Release of Claim by State—Restriction on Legislative Powers.—The provision of the Constitution of Missouri, which ordains, "The General Amembly shall have no power, for any purpose whatever, to release the lien held by the state upon any railroad," a provision having reference to the statutory liens held by the state on different railroads for the credit of the state, lent to them by the issue of state bonds, the principal and interest of which the railroad companies were to pay—was not meant, in case of a failure by the railroad companies, to prevent the state from making a compromise with any railroad company of any debt due to it or to become due; and on the compromise being effected to release the lien: Woodson v. Murdock et al., 22 Wall.

This view of the meaning of the clause is not altered by reading it in the light of the constitutional ordinance, "for the payment of state and sailread indebtedness," adopted at the same time as the state constitution, and as part of it, which ordinance, after providing for a sale by the state of any railroad indebted to it, and for the possible case of a purchase by the state of the road, provides further for a sale of the road after the state has so become owner, ordaining in such case, "That no sale " * shall be made without reserving a lion upon the property and franchises thus sold * * * for all some remaining due." This expression is to be regarded not as having reference to what the railroad company

originally owed the state, that is to say, reference to the dobt for which the read was first sold, but to any portion of the purchase-money which may remain unpaid upon a second sale; a sale by the state, where has become owner: Id.

The prevision in the same constitution, "That no law enceted by the General Assembly shall relate to more than one subject, and that shall be expressed in its title," is not violated by any act having various

details, provided they all relate to one general subject: Id.

Honce, where au act was entitled, "An act for the sale of the Pacific Bailroad, and to foreclose the state's lieu thereen, and to amend its charter," Acid, that after certain sections providing for the sale, a section providing that in certain contingencies no sale should be made, was que, a violation of the constitutional provision: Id.

CORPORATION.

Damages—Limbility for Malicious Assault by its Employee.—The validity of ch. 273 of 1874, so far as it prescribes maximum tells for the carriage of persons and property over the railways of this state, is as longer an open question in this court: Hinckley v. The C., M. & St. P. Railway Co., 38 Wis.

If, in removing plaintiff from defendant's train for his refued to pay a greater rate of toll than the maximum prescribed by said act, defendant's servants, in addition to the degree of force required for such removal, made a malicious and aggravated assault on plaintiff, which was either authorized or approved by defendant, it was a case for course

plary damages: Id.

Such an assault was alleged in the complaint and denied in the morror. The jury found plaintiff's actual damages to be \$600; but the verdict and judgment in his favor was for \$1000 damages. On defendant's appeal, the bill of exceptions failed to set out all the evidence. Med, that the verdict must be presumed to have been warranted by the evidence: Id.

DAMAGES. See Corporations.

Vindictive—As against Municipal Corporations.—Municipal corporations are not liable to vindictive or exemplary damages for personal injuries growing out of mere neglect to keep a sidewalk in a safe condition. In order to justify such damages, the negligence of the enthorities must be so gross as to be wilful: City of Chicago v. Kelly, Willia.

Trespess—Vindictive Damages.—Where a person, on the commission of a wrongful act, becomes liable only in consequence of his supposest approval or sanction of it, he will be liable only for the med bejory sustained, and will not be subject to vindictive damages: Grand v. Van Vicek, 60 Ills.

DEED.

Delivery in Escross—Statute of Frauds.—The conditions upon which an escross was to be delivered to the grantee therein named, may rest in pasel and be proved by parel: Campbell v. Thomas, 38 Wis.

When the person named as granter still retains the right of control

A dood deposited by the person named there is as granter, with a third person, with instructions to deliver it to the person named as granter. Is not an escress unless there is a valid contract of sale and purchase

between such grantor and grantoe: Id.

In pursuance of the terms of an oral surcement for the sele and purchase of land, C. paid T. a small sum, on account of purchase-money, and T. signed, sealed and acknowledged a deed of the land to C. (which purported, by its own terms, to be for a consideration of \$8000), and delivered it to II. with directions to deliver it to C. if the latter should, on the second day thereafter, deposit with II. his two notes for a certain sum (part of the purchase-price), accured by a mortgage on the same land, and pay to If for T.'s use the balance of the price. Within the time limited. C. offered to H. the notes, mortgage and money required by the oral agreement; but il., by T.'s instructious, refused to deliver to C. the deed, and T. at the same time tendered back to C. the money already paid, and left it with H. for C. upon the refusal of the latter to receive it. In an action by C. to compel a delivery of the deed to him by H.: Held, (1) That the oral agreement was void by the Statute of France. (2) That if the deed deposited with II. had contained the whole contract, it would have been a sufficient memorandum in writing to answer the requirements of the statute. (8) That if the mortgage had been drawn and signed by C. at the same time that the doed was signed by T., and deposited with the deed, the two instruments construed togother as a single contract, would probably have been a sufficient compliance with the statute. (4) That as there was no such contempora-neous execution or deposit of the mortgage, and as the deed does not show a contract by which C. was to give his notes and a mortgage for a part of the purchase-price (which is the contract alleged by him, and upon which alone he could maintain the action), there was no valid evatract between the parties, the deed was not an escrow, and it remained subject, in H.'s hands, to the control of T.: Id.

KQUITY. See Joint Tranta.

Practice—Parties to Bill.—In general, one who will be directly effected by a decree in equity, is a necessary party to the suft; and this rule is departed from only when the parties are so numerous that compliance with it would be impossible or inconvenient. Where the grounds of action averred against several defendants to a suit in equity arise out of the same transaction or a series of transactions forming one course of draling and all tending to one end, the bill is not multifarious: Supervisors of Douglass Co. v. Walbridge and others, 38 Wis.

ESTOPPEL.

Holding another out as the Owner of Party's Property.—Where the owner of property holds out another, or allows him to appear as the owner of, or as having full power of disposition over the property, and innecest parties are thus led into dealing with such apparent owner or person having the apparent power of disposition, they will be protected: Anderson v. Armidiand, 60 like.

PACTOR.

A commission merchant who sells goods for his consignors, even though he guaranty the payment of the price, receives the proceeds of the sales in a fiduciary capacity, and is liable to arrest in an action therefor, unless he has been authorized by his consignor to use such proceeds in his own business: Williams Mouser & Resper Co. v. Rayner, 38 Wis.

PORTION JUDGMENT.

Judgment founded on Judgment in another State—Re zerod of the latter—Recovery of Money paid on former—Lackes.—Where a New York judgment was reversed after a judgment founded thereon had been rendered in a court of Wisconsin, guzer, whether it was necessary to have the latter judgment set aside before moneys paid upon it could be recovered of the plaintiff therein: "Eina Insurance Co. v. Aldrich and others, 38 Wis.

. If the order setting such judgment aside was unnecessary, it was harmless, and affords the judgment plaintiff no ground of complaint:

As a general rule, none but partire to a judgment can have it set'

But where the numinal party to an action is not the real party in interest, the latter is treated as baving a standing in court, and may have control of the action: 1/1

While the New York action against A., S. & Co. was pending, M. Broa., for value, covenanted with that firm to discharge all its indebtedness and liability, and indemnify it against said action and pay any judgment which should be rendered against it therein. After a judgment against A., S. & Co. in said action had been affirmed by the New York Court of Appeals, the cause was removed by writ of error to the Supreme Court of the United States, but no supercedess bond given, and that court reversed the judgment. While the cause was pending in the Federal court, judgment against A., S. & Co. was recovered in Winconsin upon the New York judgment, and was poid by M. Bron. Held, that the latter were the real parties in interest as defendants, and entitled to a hearing on their application to vacate the Wisconsin judgment: Packard v. Smith, 9 Wis. 184, distinguished: Id.

A party is not chargeable with locker for failing to give a superscribes bond on saing out a writ of error; nor in this case can M. Bros be charged with locker for neglecting to obtain a stay of proceedings in the Wisconsin action against A., S. & Go.; especially as the granting of such a stay rests largely in the discretion of the court: Id.

FORMER ADJUDICATION.

Judgment—Against Privies in Interest.—Where a party, whose goods were insured in the name of another, with whom they were stored, after a loss, agreed with the party insuring, that suit should be brought in his name for the use of the owner, which was done, and prosecuted in good faith, but on a trial the action was defeated without fault of the neminal plaintiff, it was Hold, that the owner of the goods, being a privy in interest, was concluded by the judgment, and could not re-litigate the metter in a suit against the party who had made the immunes, for on allowed breach of his agreement to insure: Chie v. Planetite, 69 like

ABSTRACTS OF RECENT DECISIONS.

HUSBAND AND WIFE.

Wife may charge her Separate Estate to pay Husband's Debts.—It is notitled doctrine that a married woman may charge her separate property for the payment of her husband's debt, by any instrument in writing so which she in terms plainly shows her purpose so to charge it; she describing the property specifically and executing the instrument of charge in the manner required by law: Stephen v. Beale et ex., 22 Wall.

INPANT.

Contract with—Relinquishment by Parent of right to Earnings.—A minor, possessing the other legal qualifications, may, with the ament of his father, contract with a school board in this state to teach a school: Monaphan v. School District No. 1, 39 Win.

The school law (ch. 101, Laws of 1872), seems to contemplate that the contract is such a case shall be made with the tancher, and not with the father: El.

A father, by agreement with his minor child, may relinquish to the latter the right which he would otherwise have to his services, and may authorize those who employ him to pay him his wages, and will then have no right to demand those wages either from the employer or from the shild: Ed.

Plaintiff was present and assenting when his minor daughter entered into a contract in writing with a school board, an teacher, which was signed by her in her own name, and not by him. In the absence of other proof of any intention on his part to relinquish his right to her wages: Hold, that he may unintain an action against the board for such (angeld) wages: Id.

INSURANCE.

Premises uncated without Notice according to Condition.—Where a policy of insurance contained a condition that the same should be void in one the premises should become vacated, by the removal of the owner or ecoupant, for more than thirty days, without notice to the company, and its concent endorsed on the policy, and the premises were vacated January 18th thereafter, and so remained until February 18th, when they were destroyed by fire: Held, that the samued could not recover for the loss: Hertford Fire Inc. Co. v. Welster, 68 Ills.

JOINT TRNANTS.

Mortgage by One—Parties to Bill to Redeem —Where one of four joint tenants makes a deed of trust (a mortgage) of land conveyed to the four—the deed of trust purporting to convey the mhole estate—it is not necessary, on a bill filed to have the land sold under the deed of trust (in other words, to forcelose the mortgage), to make the three who do not convey parties defendant to the bill: Stephen v. Beall et us, 25 Wall.

JUNGMENTS. See Action; Persign Judgment. LAURES. See Foreign Judgment; Trust.

LANDLOED AND TENANT.

Lies of Londlord for Rent before Levy—Benkruptsy.—Under the

that: "In all cases of distress for rest it shall be lawful for the land-lord, by himself, his agent, or attorney, to seize for rest any parameter property of his tenant that may be found in the county where such tenant shall reside, and in no case shall the property of aggrether person, although the same may be found on the premises, he will to seizure for rest due from such tenant." And enacts is its eightly contion that: "Every landlord shall have a lien upon the crops growing or grown upon the demised premises in any year for rest that shall necessary for such year." A landlord has no lien upon the personal property of the tenant prior to an actual levy of distress: Morgan v. Campbell, Massignee, 22 Wall.

If proceedings of bankruptcy are begun by other persons against his tenant before such warrant of distress be actually levied, the subsequent assignment in bankruptcy, which assignment the fourteenth nection of the Bankrupt Act declares "shall relate back to the communication of said proceedings," and "by operation of law" vest in the assignes, the title to all the bankrupt's property and estate, "although the same is then attached on moses process as the property of the delter," will vest the personal property of the tenant in the assignes, to the extent.

nion of the landlord's right to levy on it: Id.

It was the object of this fourteenth section to prevent any particular creditor asserting any lien but such as existed when the patition in bankruptcy was filed: kd.

LIMITATIONS, STATUTE OF. See Action.

MUNICIPAL CORPORATION. See Damages; Railroad.

NEGLIGENCE. See Railroad.

Liability of Railroad Company for Injury to its Servents.—While it is true that a common employer is not responsible to a servent for an injury caused by the negligence of his fellow-servent engaged in the cause line of employment, yet it is the duty of a railway company, as employer, to provide safe structures, competent employees and engine, and all appliances necessary to the safety of the employed, and to adopt such rules and regulations for running its trains as will insure employ, and, having adopted them, to conform to them, or be responsible for consequences resulting from a departure from them: C. & N. W. Ballacy W. Co. v. Taylor, 69 Ill.

Injury from Street Car and Plaintif Negligent.—Where the philatiff is driving with his buggy upon a horse railway track when a set is approaching from the opposite direction toward him, at a shart distributed and in plain eight, it is his duty to turn off the track to avail a splinion, and if he does not do so, through negligeness or wifeliness; and a collision cases, he cannot recover against the railway compute, from If the latter was also in fault, unless the company or its correct within cases as that the plaintiff's is elight when company with it: Chicips W. Restory Co. v. Bert, 60 III.

Partnesser.

Payment of Individual Debt-Benkruptay of one Payment

copertnership, cannot maintain a suit to recover back money previously paid to a creditor of the copertnership, upon the ground that the money was paid to such creditor in fraud of the other creditors of the firm, and in fraud of the previous of the Bankrupt Act. The suit should be by the assignee of the partnership: Assisted v. Born, Assignee, 22 Wall.

The more fact that one partner of a firm compared of two partners, after a stoppage of payment, suffered the other, who had put is two-thirds of the capital, and who was is addition a large creditor of the partnership for money leat, to manage the partnership assets apparently as if they had been his own, proposing to creditors a compromise at seventy cents on the deliar, taking the partnership stock, transacting business is his own name, buying some new stock, salling old and new, and mingling the funds—though keeping separate accounts—does not, of itself, dissolve the partnership, and vest such acting partner with the partnership property in such way as that on a decree of bankruptcy against him individually, the partnership assets pass to his assignee in bankruptcy: M.

PATMENT.

Accepting void Conveyence as a Payment in Ignorance of the Pasts.—Where a party accepts a deed in payment of a dobt, and receipts the same, in ignorance of the fact that the deed is a nullity, there being no such property in existence as it assumes to convey, this will be no payment, and he will not be concluded by his receipt: Anderson v. Armetend, 69 Ill.

BAILBOAD. See Corporation; Nigligenes.

Approval by Electors of County Aid—Modification of Contract.—Where a proposition for county sid to a railroad upon stipulated conditions has been submitted to the electors of the county and approved by their vote (under note like ch. 326, P. & L. Laws of 1870), such conditions cannot afterwards be essentially modified by any agreement between the railroad company and the board of county supervisors: Majorreisors of Douglas Co. v. Walleridge et al., 88 Wis.

Negligenes.—Where a boy, aged about seven years, was injured while attempting to climb up the indder of a freight car while in motion along a public street in a city, and it appeared that the train was not being run at an unlewful rate of speed, it moving not factor than four miles an hour, that the train was properly manned, with every employee at his station, and that the train was under perfect control, and being run with the greatest care and caution, it was held, the company was not liable: 'C., B. & Q. Builroad Co. v. Stroupe, 60 Ill.

Action for Douth of Child—Nagingenes of Child or of Plaintif.—In an action under the statute for injuries to the person of plaintiff's intentate, seeing his death (R. S. ch. 185, sees. 12, 18), although the recovery must be confined to damages of a strictly pecunitry kind, yet, the jury are not hold to any fixed and precise rules in estimating the amount of damages (within the statutory limit on that subject), but may recomponents off pecuniary injuries, from whatever source they may precise! Dam, Adm'r, v. C. & N. W. Bollicey Co., 88 Wis.

Where the damages in such an action go to the parents of the deceased, evidence of their health and courte, and of other facts bearing on the

probabilities of their needing the services of the deceased, or of their suffering any actual pocuniary loss from his death, may be submitted to

the jury: M.

Thus, where the deceased was a boy eight years old, evidence was competent to show that his mother was a widow, and in poor health; that she had but little means, and was mainly supported by her friends; and that she drew a pension of two dollars per month, which was cut off by the death of the child: Id.

It was not necessary, in such a case, to allege specially, in the complaint, the loss of such pension by the mother of the deceased in councquence of his death, in order to render evidence of the fact admissible:

In such an action, where deceased was killed by a locomotive engine in crossing defendant's railway track, if it were clear from the undisputed facts, that the boy himself, considering his age and intelligence, did not exercise proper care in crossing the track, or that, in view of his tender years, his mother was guilty of contributory negligence in permitting him to go alone, on the errand upon which he was sent across such track, the trial court might determine, as a proposition of law, that there could be no recovery; M

But where the circumstances leave the inference of negligence is doubt, and the court is unable to say that upon the most favorable construction for the plaintiff, which can be given to his evidence, there is

nothing to submit to the jury, a nonsuit in improper: Id.

SLANDER.

Words actionable per st.—The complainant in slander avers that the parties, beying been partners in business, agreed, to terminate the partnorship, but were unable to ecttle their partnership affairs; that they submitted the difference arising on their final accounting to arbitrators, Who made a certain award, which is recited; that, notwithstanding such award, defendant continues to give out that pleintiff greatly cheated him; and that, at a specified time and place, in the hearing of certain persons named, defendant raid of and concerning plaintiff: "These backs (meaning the firm books of the parties) must be in court. Far he is a swindler and thief, and stole eight thousand dollars from me." Hold, on demurror, 1. That the words recited, unqualified by averagents, are actionable per se, as they charge a crime. 2. That if it appeared from the applicat that the words were spoken and understood marely as charging that plaintiff had made false entries in the account books of the firm, and in that manner alone had stolen from the defendant, and in that some alone was a thirf, the words would not be actionable per se, and the complaint would be bed for back of an averment of special damage: Storn V. Katz, 88 Wis.

SUBBOOKATION.

In what Cases it applies.—The destrine of subregution in equity is coalcol to the rolation of principal and surety, and guaranters, and to cases where a person, to protest his own junior lies, is compelled to remove one which is superior, and to cases of incurers paying leases. In the first class named, the destrine is applied to avoid a multiplicity of suits. In the second class, the person discharging the superior lies is treated as its purchaser or assignce, unless the facts show it was intended as an absolute payment. In the last class, the insurer is subrogated to the remedies of the assured, upon the ground that upon payment he is entitled to the property insured as being abandoned by the assured: Bishep v. O' Conner, 69 Ill.

TRUSTS AND TRUSTEES.

Good Faith-Purchase by Trustee of Trust Property-Actual Fraud -Lapse of Time. Though equity will enforce in the most rigid manner good faith on the part of a trustee, and vigilantly watch any acquisition by him in his individual character, of property which has ever been the subject of his trust, yet where he has sold the trust property to another, that cale having been judicially confirmed after opposition by the cestwique trust, the fact that thirteen years afterwards he bought the property from the person to whom he once sold it does not, of necessity, vitiate his purchase. The question in such a case becomes one of actual fraud. And where on a bill charging fraud, the answer denies it in the fullest manner, alleging a purchas bond fide and for full value paid, and that when he, the trustee, made the sale to the person from whom he has since bought it, the purchase by himself, now called in question, was not thought of either by himself or his vendee—the court will not decree the purchase fraudulent, the case being heard on the pleadings; and without any proofs taken: Stephen v. Beale et uz., 22 Wall.

The complainants in this case, who alleged fraud and relied on the trustee's possession of the trust property after an alleged sale of it, as evidence of it, not stating solen the trustee came into possession—that is to say, how soon after his former salo—the court assumed the time to be thirteen years; this term having elapsed between the date of the sale by the trustee and the fling of the bill (or cross-bill, rather) to set it aside; the court acting on the presumption that the complainant stated the case as favorably, as he could for himself, and would have mentioned the fact that trustee had been in possession long before the bill was filed, if he had really been so: Id.

Right to claim Compensation.—Where a trustee claims compensation for services, he must show that he has discharged the trust; and if the agreement to pay him out of the fund is disputed, he must establish it by a proponderance of evidence: Jenkins v. Doolittle, 69 III.

ISAAC F. REDFIELD.

As we go to press we receive the announcement by telegraph of the death, at his residence in Charlestown, Mass., on March 20d, of Hon. ISAAC F. REDFIELD, formerly Chief Justice of Vermont, and for the last fifteen years one of the editors of this journal. We shall present our readers a sketch of this distinguished jurist in a future number.

AMERICAN LAW REGISTER.

MAY 1876.

ISAAC F. REDFIELD.

As already briefly announced in our last large, this distinguished jurist died at his residence in Charlestown, Mann, on March 28d 1876. Be great a less to the science of jurispredence cannot be passed by without some notice, especially in a law journal with which he was so long and so intimately connected, and in which he had made himself no less the friend than the instructor of the entire legal profession of the United States.

ISAAC FLETCHER REDFIELD was the oldest of twelve while of Dr. Peleg Redfield, an eminent physician, and was been April 10th 1804, at Weathersfield, Vermont. He graduated at Electron College in the class of 1825 and was admitted to the bar of We mont in 1827. After practising at Derby for eight years, during the last three of which he was atterney of the state in Ovice county, he was in 1885, at the early age of thirty-one, though the legislature of Vermont to the beach of the Suprema Co and held that position by encousive annual elections whill It when he resigned, or rather declined a re-election. sight years of this period he was Chief Justice of the es 1857 to 1861 he was also Professor of Medical Justine Dertmouth College, succeeding the Hon. Jeel Parker. In 29 removed to Massachusetta, where he continued to re death, with the exception of a year or so, in 1867 and 1868, wi he spent in England and France, as special counsel for the Unit States, by appointment from the State Department, to-Yes XXIV .-- 38

the interests of the Government in the property that had belonged to the Confederate states at the close of the war.

These few events mark the outlines of his public life, but they give little indication, except to the instructed, of the steady industry, the activity of mind and the amount of useful labor accomplished during more than the third of a century.

During all the time that Judge REDFIELD sat upon the bench, the duties of a judge of the Supremo Court of Vermont were extremely arduous. The court consisted during most of the time of five judges, who held separate circuit courts for jury trials, were es officio chancellors, and heard and determined many important cases in equity, besides sitting in bane for several months each year for the final decision of all questions of common law and equity upon . writs of error and appeals. During the first few years that Judge REDFIELD occupied the bonch, the judges also, under a sta-, tute of the state, reported their own decisions. All of these varied and exacting duties he performed, not only to the satisfaction of his own bar, but to the great reputation of his court and himself throughout the country. Ilis decisions extend from the eighth to the thirty-third volume of Vermont Reports, inclusive, and long before he lest the beach they had established for him a national reputation as a wise, learned and able jurist.

Great and permanent, however, as is his reputation as a judge. it is probable that he was even more widely known to the profession of the present day as a law-writer. Notwithstanding the constant and engreesing labors of his judicial position, Judge REDread found time, while still on the bench, to write a text-book on the Law of Railways, published in 1857, which at once became the accepted authority as the repository of the American law on that important subject, and, after passing through five editions, remains without a rival at the present day. It is probable that the success of this work, combined with his desire for a more settled and domeetic life than was possible under the requirements of circuit duty on the bench, led him, in 1860, to the resolution to resign. and devote himself more exclusively thereafter to the literature of the law. The weight of advancing years he could scarcely have felt. Troot, and active in body as well as mind, he still lacked four of the age at which the Procrustean laws of New York bad

of the age at which the Procrustean laws of New York had ad Chancellor KENT unfit for longer judicial service, and at he, like the great chancellor, was in his prime, and like him, too, he devoted the remaining years of his mature intellect to the instruction of his professional brethren by his pen. In 1864 he published the first volume of an elaborate work on the Law of Wills, which was subsequently expanded, in successive editions, to three volumes, covering the entire subject. Every lawyer will appreciate the magnitude of such a labor. Few states, except the youngest of the union, fail to afford, by themselves, cases enough on this prolific subject to fill a text-book, and the task of collecting, arranging and collating them, and extracting the rules of decision from the vast and incongruous mass, is one that might well appal a less industrious and courageous man. This, like his preceding work, had a marked success, and the anthor was engaged in the last touches of a new edition at the time of his death. Besides these principal works, Judge REDFIELD published, in 1869, a treatise on the Law of Carriers and Bailmonts, which was, however, mainly a condensation, and more convenient form, of the parts of his work on Railways relating to those subjects; in 1870-1872, a collection, in two volumes, of Leading American Railway Cases, with notes; in 1871, in connection with Mr. M. M. Bigs-Low, a collection of Leading American Cases, on the Law of Bills of Exchange, Promissory Notes and Checks, with notes; a volume of Leading American Cases on the Law of Wills, with notes; and also edited, with great care and learning, Greenleef on Evidence, Story on Agency, on the Conflict of Laws, on Equity Jurisprudence, and on Equity Pleadings.

In 1861 Judge Redfield became one of the editors of the American Law Register, and from that time to the present, few numbers have been issued without an article or an amotation by him upon a leading case. Of the extent and importance of these labors our readers do not need to be told. Covering in their range every branch of the law, and every variety of treatment, from a brief pertinent criticism of the case itself up to the most learned and elaborate monograph on the subject suggested by it, they have exhibited the depth and breadth of his learning, the facility of his command of legal principles, the high integrity and fearless independence of his personal character. These qualities, no less than the warmth of his heart, had made him seem a friend to all his readers, whose monthly visits every one will regret to have so mexpectedly terminated.

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during the last fifteen years were many of great importance, to which he gave much thought and labor. As specimens we may mention those on Street Railways, vol. 1, N. S., 198; Mortgages, vel. 2, p. 1; the Conflict of Laws Affecting Marriage and Divorce, vol. 3, p. 193; the Responsibilities and Duties of Express Carriers, vel. 5, p. 1; Regulations of Inter-state Traffic by Congress, vol. 18, p. 1; the Law applicable to the Negotiation of Contracts by Telegraph, vol. 14, p. 401; and the Right and Power of Eminent Domain in the National Government, in the April number of the present year. These articles he regarded as among his best work; he teck pleasure in them and in the fact that in them he was addressing the entire professional audience of the country, who, through these writings, had become his admirers and friends. His last work was the correction of the proofs of the article on Eminent Domain in the April number. Besides this, he had prepared some notes to cases which will yet appear in our pages during the next few months.

His writings were characterized by breadth and liberality of views, by clearness and force as well as originality of opinion, by a conservatism as cautious as it was free from timidity or fogyism, and by great learning, not only in case law, but in fundamental legal principles which he handled with the case that comes from long familiarity. He wrote rapidly, with the facility of a full man. Hence his style was perhaps always a little diffuse and occasionally lacking in grace, but, however hasty, it never degenerated into inaccuracy of thought or even into obscurity of expression.

In this day of the diffusion of education and the multiplication of books, perhaps it can hardly be said, as Coke, paraphrasing Beneca, says of Littleton, that "when a great learned man (who is long in making) dieth, much learning dieth with him." Yet in a considerable sense it is true even now that a ripe and experienced scholar in the law leaves a gap which can never be quite filled. A certain command of questions from having grown up with them from their craffic to their maturity, does die with the learned of their own day and generation. The times change and the questions which commented attention in the law change with them. The rules which have prevailed in the contest of yesterday become settled, and to-morrow are accepted upon didactic authority, while the reason which in-

problems still unsolved. But the learning which accepts account plished facts upon authority is never quite as complete, as intimate, as stereoscopic in its view, as that which has watched their growth and knows all their parts from its own observation. In this sense the learning of each generation dies with it, and in this sense it may be said that upon certain subjects which he had made peenliarly his own the authority of Judge REDFIELD's opinion sunuet be replaced. Notably is this the case upon railroad law. The whole of it had grown up while he was in active life; it was familiar to him from its modest beginnings until it had assumed its present vast proportions, as the heaviest title in American litigation. It was his favorite field in the law, and he grew with it, and kept pace with its constant expansion. It is asstainly rather remarkable that, although he was a life-long Democrat, and had received his political education while the strict construction its school had the unquestioned control of that party, yet he adepted " in his latter years what may be called the new school of latitudinarian construction of the constitutional powers of Congress area railroad lines running through more than one state, and indeed over all questions of inter-state traffic. That he not only entertained but advocated these views, is a striking evidence of the honesty of his convictions and the courage of his character-

As already said, Judge REDFIELD was a Democrat from early life, and the adoption of such opinions at a time and in a place where the Democratic party was in a hopeless minerity; required no small degree of courage, as well as sincerity. In this connection, mention must not be omitted of the most remarkable incident of his life, honorable alike to him and to his state, and without a parallel in American judicial history. The legislature by which he was elected to the Supreme Court of Verment in 1835 was strongly opposed to him in political opinion, and so continued for the twenty-five years through which, by necessary tribute to qualifications for his position was never paid to any judge in any country.

But though a Democrat he was in no present sense of the times a politician. He was, above all things, a lawyer. Further his most remarkable quality was the warmth and strength of his law of justice, combined with his sense of the value of the grindship store decicle. He stood by the law as a general sub-principle.

he believed in the existence of a science of administrative justice, and recognised clearly that choice of evils which every judge so often encounters between individual hardship and the breaking down of a salutary rule. In such cases he stood firmly upon the ancient ways, but he never yielded to a result which failed to do individual justice, except under compulsion.

Apart from his professional eminence, Judge REDFIELD presented traits of character to command affection and respect. His manners were frank and simple, free from all arrogance or affectation, and especially free from all potty joulousy of younger men. And these outward qualities were the natural manifestations of a kind and genial heart. Long habit of ultimate decision had made him direct and positive in the expression of his opinions, and he had a high estimate of the province of a legal journalist. These qualities, combined with the natural warmth of his feelings which years never cooled, led him sometimes to great freedom of criticism and the use of very direct language. But nothing could exceed the amiable readiness with which he changed any expression which could be calculated to give pain or injure the sensibilities of another. In 1862, if a personal illustration may be perdoned, the writer, many years Judgo Expristo's junior, assumed the responsible position of managing editor of this journal. In the constant correspondence of fourteen years since then, no suggestion that hinted at avoiding offence or respecting the feelings of others, ever failed to meet an immediate and cheerful response to after or strike out anything that tended, however remotely, to such results. In his response to the address of the bar, on his retirement from the beach in 1860, he has himself well expressed his own character in this respect, and we cannot better close this hasty and inadequate memoir than by a brief extract from his own language:--

 as those in the majority may safely count upon in those popular prejudices or commutinus which will sometimes occur, and are liable to affect the popular estimate of all men and all judges, who hold their tenure of office by annual elections, through accident or misfortune, k may be, and without fault or infirmity even, such a support, it is not to be denied, in such case, is always agreeable to the feelings; it has, nevertheless, compelled me to devote myself with the more perfect single-heartedness to the discharge of my public duties; and has at the same time weared me from all embarrassing interest in the course or the results of mere partisan policies, without in the least diminishing my study of, and my interest in, those great social and moral, not to say religious problems, which lie at the foundation of all true greatness and respect, as well in empires and states as with individuals. And among these I have never allowed myrelf to feel, for a moment, that I was at liberty to forget that an abiding and unaffected respect for the law and its regularly constituted ministers, whatever might be my private opinions of the windom of the one or the good character or conduct of the other, must certainly be reckened. And in this view I have always, and under all circumstances, felt it my duty to study to viudicate all laws, however edious, from that contumely and repreach which the well-disposed and truly patriotic will nonetimes thoughtlessly heap upon the constitution or the laws of the state or the nation. without reflecting that, in so doing, they are doing all in their power to destroy that respect for law and order in society which is the only guaranty in free states, against outrage and abuse, from the reckless violence of the mob or the assassin, on the one hand, or of overbearing and uncompulous majorities on the other.

"I have thus made it my study to do nothing, and to my nothing, calculated to offend the sensibilities of others, unless from a strict sense of duty, and in vindication of those great meral truths which underlie the very foundations of all domestic, social and civil institutions, and then not obtrusively or offensively, I trust, but none the less factority."

These truthful words, spoken with medical but manly cander, describe his character as fitly as any more elaborate panegyris. In all his relations, as a juriet and as a mean, he was a citiesa whom any state might be proud to set before her younger some as a model for emulation.

J. T. M.

RECENT AMERICAN DECISIONS.

Supreme Court of New Hampshire.

. HENNESSEY BY AL. R. WALSH BY AL.

, It appeared that the land on which the Catholic church and parsonage in Portspecula stands, was vested in the defendant, Bacon, bishop of the diocese, no trust lights declared in writing: Held, that no special trust could be proved by parel.

He appearing that the funds with which said land was bought and buildings streeted had been furnished for that purpose by subscriptions and contributions made to the priest in charge for the time being, under the law, usage and polity of the Réman Catholic church, by Catholics and others resident in Portsmouth and elsewhere: Hold, that no trust resulted to the society or congregation worshipping in said church.

Matrices, ch. 130, sect. 5, because, assuming that the said congregation or society studie, under said statutes, be considered as having corporate powers, these plaintiffs could not maintain their bill for the protection of the quasi corporate rights, because it did not appear that they had any authority, and that they could not maintain the bill for the protection of their own interest in the quasi corporate property without alleging that the society was fraudulently neglecting to protect its own rights, and making the society a party defendant.

The defendants having stated in their answer that by the law, usage and polity of the Reman Catholic church, the title to all lands used for religious purposes, clusteles, &c., is vested in the hishop of the diocese in which the name are situated for the use and benefit of the universal Catholic church, and that all gifts and contributions for such purposes are understood to be made under that rule, and that, these gifts and contributions were made under that rule, and it having been found by the court that the legal title to the property was vested in the defendant, the bishop, without any written declaration of trust, and that he was accountable only to his exclusional superiors, Hold, that the said defendant was not accountable in this suit for his management of the property; and it appearing that the defendant Welsh, had acted under the bishop's direction, Hold, that he was not accountable in this suit. Hold, that this court had no authority to take this property from the histop and place it in the hands of a new trustee.

BILL in equity.

This cause having been tried by the Circuit Court, before RAND, J., it was agreed that it should be transferred upon the bill and untowers and the material facts found by the court. The facts found are as follows:

On the 15th day of June 1852, Charles McCallion, a Catholic priest, was stationed at Portsmouth, by the appointment of J. B. Fitspetrick, Bishop of Boston, within whose diocese was the city of Portsmouth and vicinity. There was at that time, and ever since has been, at Portsmouth and in the vicinity a congregation of Boston Catholics, who have wershipped at Portsmouth under

the ministrations of said McCallion and his successors.' They have never had any corporate organization under the laws of this state. McCallion undertook to build a church for the ues of the Catholies of Portsmouth and its vicinity; and on the said 15th day of June 1852, purchased a lot of land for that purpose of George M. Marsh, for \$1500. He paid \$200 in each, and gave a mortgage for the balance of the purchase-monoy. McCallion them took subscriptions and contributions from his congregation and others, and erected a wooden church upon the land, which was used by him and his successors as a Roman Catholic church till it was burned in November 1871. McCallion was named as defendant in the bill, but the bill was not served on him, and he did not appear.

The mortgage remaining unpaid, it was, on the 8th day of June 1857, assigned to D. W. Bacon, Bishop of Portland, and one of the defendants, to whose diocese Portsmouth and the vicinity had been in the meantime transferred. The assignment was recorded in the records of Rockingham county, on the 18th day of June 1857, and Bishop Bacon has ever since continued to held the mortgage.

On the 22d day of November 1858, one Owen Martin, having recovered judgment against McCallion, levied his execution on McCallion's equity of redemption in the premises, and the same was conveyed by sheriff's deed to Martin for \$162.62; and he afterwards, on the 14th of May 1855, conveyed the same for \$288, to Bishop Fitspatrick, within whose diocese Portsmouth then was.

By the usages of the Roman Catholic church in New England, all church structures are held in the name of the bishop for the use of the congregations who respectively attend public worship therein. The legal title is vested in the bishop. Ne trust was expressed in any of the conveyances above referred to; but the money was furnished by the people, not by the bishop. The bishop appoints the pricets to the several parishes in his discuss and removes them at his pleasure. Any misconduct of the pricet is corrected by complaint to the bishop, who is himself answerable to his occlesiastical superiors.

Soon after the erection of the church above named, McCallion was summoned to another dicesse, and Patrick Conovan, D. W. Murphy, and the defendant T. C. Walsh, were successively appointed by Bishop Bacon to the effice of parish priest at Perts-

Bucon up to the time of the filing of the plaintiffs bill. They also repaired and enlarged the church building from time to time, and procured insurance upon it in the name of Bishop Bucon. And for these purposes they used money obtained in the church by contributions for the support of the church and its services, pewrent, special subscriptions, and sometimes their own private funds. Most of the plaintiffs, if not all, contributed to these objects; some of them quite largely. But what precise sums were contributed by each, and for what particular object these sums were expended, did not appear that any account was ever rendered to the congregation. But the sums were contributed to provide a regular Catholic service in Portsmouth, and upon promises by the several priests that such a service should be secured to the people.

The defendant Welsh was stationed at Portsmouth on the 11th of June 1869. In September 1860, he procured incurance on the church in the sum of \$9000, in the name of Bishop Bacon, paying the premiums partly by money collected in the usual manner, and partly with his own money. The church was burned in November 1871, and the insurance was collected to the amount of \$8400 by Bishop Bacon or in his behalf.

Soon afterwards the defendant Walsh undertook to build a new church upon the same site, and set about getting subscriptions for that purpose. He also called a meeting of the members of his congregation, at which time a committee was chosen to assist in the undertaking, and also a treasurer was chosen. Three persons were nominated by the defendant Walsh, and approved by the vote of those present. Differences soon arose between the committee and the treasurer on the one part, and the defendant Walsh on the other. These differences grew out of the opposing claims of the two parties as to the control of the funds to be collected, and as to the plan of the church to be built. The defendant Walsh claimed substantially that he should handle the funds, and distate as to the kind of church to be built; and he procured plans to be made without conculting the committee and tressurer. Upon the happening of the differences above mentioned, the committee and treasurer resigned, and the defendant Walsh proceeded to collect maney and build a church according to his own views. Only ten dollars were paid into the hands of the tressurer, and that sum

was paid by Walsh, and soon afterwards paid back by the treasurer to Walsh. The church, erected upon the site of the old church, was a large brick church, costing about \$40,000, about \$16,000 of which remain unpaid at the present time. Large contributions were made to build this church, both by the Catholics of Pertsmouth and by others not connected with the Roman Catholic church. The defendant Walsh gave one thousand dellare. The obserch erected has been and is now used for public worship according to the forms of the Roman Catholic church, the defendant Walsh officiating as priest. On Sundays the usual services of that church have been holden by the defendant Walsh at 8 o'clock in the forenoon, and at 8 e'clock in the afternoon, at which all persons are admitted who choose to attend. At the 10 o'cleck Sunday morning service an admission fee of 25 cents has been demanded by the sexton, acting under the direction of Mr Walsh, of all persons except the poor, pew-holders, and those who have contributed towards the erection of the church. Pows are also rented to individuals by the priest in the ordinary manner, and he takes the rents for the support of the services of the church. There was considerable controversy about the propriety of the 25-cent admission fee; and some persons, whe attempted to enter the church without paying the fee, have been excluded by the sextens, acting under the direction of the pricet, who claimed the fee in order to help pay the debt of the church. There was evidence tending to show that it was against the rules established by the Council of Baltimore that any one should be stepped at the deer of the church to pay a fee. There was also evidence tending to show that the rules of the Council did not forbid the collection of money at the door of the church to pay the debts of the church. The rules of the Council of Baltimore may be referred to in the argument of this case, and are made part of the case.

The Roman Catholics in Pertamouth and vicinity, whose usual place of worship is this church, number about 1500 or 2000.

In regard to the admis :on fee of 25 cents, it was proved that a similar fee has been demanded at some other Catholic churches in New England.

One of the plaintiffs, John Conlon, moved to withdraw from the suit, and another, John E. Hennessey, is a miner.

The plaintiffs are all members of the Catholic church in Ports-

mouth, except perhaps Michael Cunningham, who has been excommunicated for assault upon the priest.

The bill states that McCallion held the church and parsonage in trust for the purpose of a place of public worship for all the Catholic residents of Portsmouth and vicinity, and for all persons desirous of attending services in the Catholic form to attend the public worship therein to be had according to the Catholic religion and for the conversion of the people to that faith, and that said church was to be a free church where all people desirous of doing so might attend public worship without price. It also states that all the funds contributed afterward to McCallion and his successors. for repairing, enlarging and insuring the church, were contributed for the same trust; that McCallion had abandoned the trust; that the defendant, Becon, had received the insurance-money, and that the defendant, Walsh, under Bacon's direction, had rebuilt the church, assuming the whole control, and excluding the members of the society from any voice or part in the matter; that he had excluded from the services of the church those who had not in some way contributed, unless they paid an admission fee.

The bill further charged that the defendant, Walsh, had been guilty of using harsh and indecent language, communations and threats against those members who would not contribute.

The prayer of the bill is as follows:

"Wherefore, the plaintiffs pray that the said Walsh and the said bishop, having assumed the place of trustees illegally and wrongfully, they and their successors and assigns be ordered and decreed to account for the disposition of the said insurance-money and the said trust fund which have come into their hands from the plaintiffs and all other persons, so the plaintiffs and all the subacribers to said fund may know where and how their trust fund is invested, and where to find it hereafter in case of renewed trouble or perversion thereof, so the same may not all be squandered and lest, and that the said defendants Walsh and the bishop, and their successors be ordered and decreed to keep said church and land. and the avails thereof for the purposes of said trust, and for such trustee as this court shall appoint, and for public worship of God in said Portsmouth and vicinity, according to the Catholic faith, free to all whenever services are held therein, whoever pays for such services.

" That a new trustee be appointed by the decree of this court to

take charge of said trust fund, and to see that said trust is enforced.

"That said Walsh and said bishop, and their successors in the priestly office over said church, he ordered and decreed to permit any person to attend the public worship of God, whenever religious services are held in said church, and to occupy such seats as are not sold or let, or to occupy the sisles as they choose, and not to charge any price of admission to such public religious services so long as a single subscriber to said trust fund, who has subscribed for the purpose aforesaid objects, and to order and decree otherwise in reference to the premises as may be just and right to pre-tect all parties.

"And whereas, the plaintiffs cannot now attend said church without strife and contention, and without being ejected therefrom, may it please your beners to grant to the plaintiffs a writ of injunction to be directed to the said Walsh and the said Bacon, and their successors in the priestly office aforesaid, and their aiders, servants and abettors, strictly enjoining them from preventing the plaintiffs and their families, and all persons desirous of attending the public worship of God according to the Catholic faith, when held in said church, from attending said services freely and without money or price, and enjoining them from debasing the alture of said church from the worship of God to a place where a price of admission is charged, and curses, disease and death are asked for to fall upon members of the church and people, who in worldly matters decline to follow just as the priest and bishop direct, and for such other relief as may be just."

The answers substantially stated that by the law, usage and polity of the Reman Catholic church, the title of lands used for religious purposes, churches, &c., is vested in the bishep of the diocese for the use of the universal Catholic church, and all gifts and contributions for such purposes are understood to be made under that rule; that the purchase-money of the land on which the church and parsonage were erected were given under that rule, and also all the money that had afterward been contributed towards repairing, enlarging, insuring and rebuilding; that the defendant, Walsh, was accountable only to the defendant, Boson, and the defendant, Boson, only to his occlesiastical superiors; that they had full authority to rebuild as had been done, and were accountable to no person but their occlesiastical superiors. They denied

that there was any trust for the purpose of a frue church, and raid that the public worship could not be supported on that plan. The answer denied all improper conduct on the part of the defendant, Watch, but also said that the matters complained of were matters wholly of occlesiastical jurisdiction. The bill and the answer are much abridged in the foregoing statement, which, however, contains in connection with the statement of facts found by the court all that is necessary for the understanding of the questions raised and decided.

Goodell and Mareton, for plaintiffs.

Hatch and Fink, for defendants.

Creature, C. J.—It appears, from the facts reported in the case, that the society or congregation usually worshipping in the Catholic church in Portsmouth numbers from 1500 to 2000, of whem the seventeen plaintiffs appear to be the only persons dissatisfied with the management of the property. They do not complain of the dedication of this church property to the pious uses of the Catholic religion, but appear to claim that the society ought not to be excluded from the management and control of the property.

It is somewhat difficult to ascertain from the bill and the case on exactly what ground the plaintiffs desire to stand. Conceding, as they do, that this property has been given by themselves and by others to somebody for some purposes, they of course have no private rights of property. They do not profess to sue as well for the other members of the society as for themselves, so that they do not appear to represent, or claim to represent the society, collectively.

If I understand the views of plaintiffs' counsel they are these: They say that this property was given to McCallion in the first instance under such circumstances that a trust resulted to the society or congregation of Catholies in and around Portsmouth, and that by our law (Gen. Stat., ch. 189, sect. 5), this fund or property having been given to that society, the society is by virtue of the statute endowed with corporate powers for the purpose of protesting and managing the fund and property. I say resulting trust, because it is found by the court that the legal title to this property is vested in the bishop, but that no trust was declared in

any of the conveyances of the property. Me question appears to have been made in regard to the legal effect of the conveyance to McCallion, the mortgage by him, the levy on the equity of redemption for McCallion's debt by Owen Martin, the purchase of that equity by Bishop Fitspatrick, and the perchase of the mortgage by the defendant, Bacon. It is found among the facts by the court that the legal title was in the bishop, now deceased, and that in the conveyances by which he obtained the title there was no declaration of trust. This is a statement of the general rule of the Catholic church, and also intended to apply to this particular case. In fact, it appears that no other result could be produced by the conveyances found in the case.

I understand, therefore, the position of the plaintiff to be, that the legal title being first in McCallion and then in the bishop, the real ownership of the property was in the society.

Sec. 5, ch. 189, General Statutes, is as follows: "If any denation, gift or grant be made to any unincorporated religious society, such society shall have the like power to manage, use and employ the same according to the terms and conditions on which the same may be made, as incorporated societies may have by law—to elect suitable trustees, agents or officers therefor, and to prosecute and sue for any right which may vest in them in consequence of such donation, gift or grant; and such society shall be a corporation so far as may be necessary for the purposes expressed in this section; but the income of the donations, gifts or grants to any such naineerporated religious society shall not exceed the sum of \$5000 a year."

Under this statute it is claimed that the society or congregation of Catholics is, for the purpose of managing this fund, a corporation, and entitled by its duly authorized agents and committees to see and maintain actions, and liable to be seed. But the plaintiffs have not made this society a party, neither do they show any authority possessed by them to act for it.

It is true that there are cases in which some of the members of the corporation may, on their own behalf and that of the other members, maintain a bill in their private capacity where the corporation and its officers are negligently or fraudulently permitting its interest to be secrificed.

Poercon v. Tower, and Windor v. Balley, in this court (to be reported in 86 N. H.), were both cases in which a past of the stock-

and his ewn conscience whether he will appropriate this property thus vested absolutely in him for the benefit of the Cathelic church according to its rules and regulations, or otherwise. So long as he does not use the property so as to injure others, or violate the laws, it is not easy to see how he is amenable to the laws.

It is clear that this court cannot in this suit take this property from the hands of the bishop, and place it in the hands of a new trustee.

And so far as the bill claims an accounting from the defendants, Walsh and Bacon, it clearly must fail. The money which has been expended on this church property has been given absolutely to the bishop, to be used by him and under his direction, without accounting to anybody but his ecclesiastical superiors.

So in regard to the complaint that the defendant, Walsh, has wrongfully excluded the plaintiffs from some of the religious services in the church. The court has not found that it is contrary to the usages and rule of the Catholic church to exact, from those who are able to pay, contributions according to their means for the support of the institutions of religion according to the Catholic faith. The case, therefore, does not call for an expression of the views of the court on this point, but I am very strongly of the opinion that this is entirely a matter of ecclesiastical jurisdiction with which this court has nothing to do.

The bill also contains formidable charges of indecent and abusive speech on the part of the defendant, Walsh, in regard to some or all of these plaintiffs.

It is enough, perhaps, to say here that the court has not found the facts to be so. I do not understand that the bill charges any expressions of a slanderous or defamatory character. The language stated in the bill consists rather of imprecations and communations, doubtless calculated, if it had been used, to wound deeply the sensibilities of the persons against whom it is alleged to have been directed. It does not appear to me that such matters are within the civil jurisdiction of the courts. They are rather matters of ecclesiastical cognisance. It is quite likely that in many religious denominations, Protestant as well as others, there may be exercised a good deal of spiritual tyranny, and there may be, and probably are, many persons who, from the effect, perhaps, of early education and association, and the natural constitution of their mental character, are unable to resist such influences. Civil

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courts can protect their rights of person and property, but cannot liberate their souls. The court, bowever, has entirely negatived all conduct of this kind complained of in the bill.

It will be observed that the whole question in this case is as to the conflicting claims and rights of these plaintiffs on the one hand, and of the society or congregation of Catholics in Portsmouth and their ecclesiastical directors and guides on the other. Both parties claim under the same title, and that is the legal title once vested in the defendant, Bacon, and now, we must suppose, in his successor. It is true the counsel for the plaintiffs claims that the mortgage from McCallion to his vendor was void as not having been sanctioned by the society, but most assuredly, putting it in the strongest way for the plaintiffs, the society could not be made a quest corporation until the gift which was to make them so had been completed, and the transaction of the deed to McCallion and the mortgage back must be considered as one.

As between these plaintiffs, then, on the one hand, and the defendants on the other, who I think must be considered as really representing the society, it appears to me that the right is with the defendants, and that the bill must be dismissed.

LADD, J., concurred.

SMITH, J.—I am also of the opinion that this bill must be dis-The plaintiffs, seventeen in number, out of a society or congregation of some fifteen hundred, bring this suit, not in behalf of themselves and all others interested, for removing some grievance common to them all, but to effect some change in the manner in which this church property is held, not asked for or desired by the great body of their associates. The title to this lot of land and to the church structure thereon, is, upon its face, absolute in the defendant, Bacon. If it is affected by any trust, it must result by operation of law from the payment of the purchasemoney. The property was purchased from contributions and subscriptions of sundry individuals, Catholics and others, of Portsmouth and vicinity. By the usage and polity of the Roman Catholic church, all church structures are held in the name of the bishop. All who contributed to the purchase of this let and erection of the church edifice, did so, as the case finds, with the understanding that the title would be vested in the bishop, to he analise he him the the narroses of religious worship according

to the Catholic faith. Having donated their money for this purposes, they cannot now impose new conditions as to the purposes for or manner in which it shall be held. No trust can, therefore, result to the plaintiffs.

The church structure erected with these funds, and so held by the defendant, Bacon, has been held for the use of those who desired to worship therein as Catholics, and there is no allegation or proof that he has attempted or threatened to divert the property to any other use.

The facts reported by the judge who tried the cause, fail to sustain the plaintiffs' allegation of misconduct on the part of the defendant, Walsh. He has charged an admission fee for attendance upon one of the three services held on the Sabbath, but the poor, the pew-holders, and those who contributed towards the erection of the church, are exempted from this charge. Such of the plaintiffs as contributed would of course not be subjected to such payment, and those of the plaintiffs who did not clearly have no such interest in the title to those premises as will entitle them to maintain this suit.

It does not appear to be contrary to the rules and usages of this denomination to require those who attend public worship to contribute to the expense thereof. However desirable it may be to furnish the opportunity for public religious worship "without mency and without price," it has seldom been proved practicable to do so.

There is nothing in the provisions of ch. 189, General Statutes, that prevents any other trustee or person than those named in sec. 5, to whom property has been donated in trust, from holding it for the benefit of a religious corporation or society. No uniform sule is attempted to be laid down to which every religious society, whether incorporated or not, must conform. But rather provision is made whereby defects in a church organization are supplied, so that property donated for pious purposes may not fail of reaching the objects intended by the donors.

Bill dismissed.

This case presents, in another form, the same question we have repeatedly discussed in these pages—how far the civil courts will attempt to control the ration of the coclesiastical courts, or lesse, in segard to matters exclusively

of ecclesisatical cognisance. We are gratified to be able to offer the profession the opinion of the highest judicial tribunal in one of the oldest of the American states, upon a form of this question, in regard to which there is, in the communky, undoubtedly evidence of some degree of over-watchfulness, nossibly of over-sensitiveness, quite out of preportion to its inherent importance or dauger, but upon which the opinion is as entirely exempt from all color of seal or prepassession as it is possible to conceive. This is the more refreshing, as we have before had occasion to review the opinions of the highest judicial tribunals in some of the states, and even of the Supreme Court of the nation, where the controversics had their origin in the occleriastical tribunals, which the civil courts were asked to revise, and where it was impossible to account for the diverse nature of the decisions upon any other rational basis of argument or conjecture, except that of partisan prejudice and prepossession, however painful it may be to believe in the existence of such a sentiment in the highest judicial tribunals of the country t Gertin v. Pennock, ente, vol. 9, pp. 210-225; Watson v. Jours, aute, vol. 11, pp. 430-457; s. c., 13 Wellace 679. We have also discussed, very much at length, in the cases just cited, and in the now celebrated Cheney case, auto, vol. 16, pp. 295-313, the general question invalved in the case now under consideration. This question, briefly stated, is simply, as before intimated, to what extent the civil tribunals in the American states can lawfully interfere with what is purely eccleriastical administration. We may state here that we me the terms "coclesiastical administration" to cover all that pertains, strictly and locally, to the action of churches, whether it be in obedience to the decisions of church courts or the advice of church councils, or, on the other hand, the personal action of executive officers of such charches, like trustees, pasters, priests, bishops or popes, single or comblood. In all these cases the civil courts most regard the action, and the right of contest in the same way. It is simply

on incoley to what extent pay sad can expect to obtain redress for any ecolosiaction which he may regard as irregular or appreciate, as well as subversive of his personal rights. And to this extent the cases off agree that It most be the volawful justingement of some personal right, of pocuniary value, and of a character redramble to the civil courts, in order to justify their interference in matters probately of ecclesiastical cognisance: Grimes v. Harman, 30 Ind. 196. And in determining this question of "unlawful infringement," some principles are well settled by the repeated decisions of the courts, with slight or no condict.

- 1. The decisions of controlastical courts, or officers, having, by the rules or laws of the badies to which they belong, jurisdiction of such question or the right to decide them, will be held conclusive in all courts of the civil administration, and no question involved in such decisions will be revised or seviewed in the civil courts, except these pertaining to the jurisdiction of such. courts or officers, to determine such questions according to the law or many of the budies which they represent. This is abundantly shown in the cases already cited, and most of the authorities are referred to in the pages before cited, and need not be here remained: Bouldin v. Alexander, 15 Wall. 181.
- 2. It is a universal rate of law, applicable not only to this subject, but to all subjects connected with legal administration, that one who becomes a metabor of any church, or other excisty, thereby consents to be governed by the rates or lowe of such organization, and that he cannot justly clotte to have suffered wrong or injury by the enforcement of such rules upon himself or his property, upon the mexica, subset into fit injurie. And this maxim applies to cases where the party releasestly places himself in a position ubimeetly to have

an our done affecting his interests, or done at the will of another, as if he subjected himself directly and immediately to the set; upon the principle that one who puts the slowest agencies at work, which are sure in the end to produce a given result, is as truly the author of the ultimate result as if produced by ever so immediate and direct names. This is but an elementary proposition, and needs no authority.

2. That the esures will not interfere with the internal police and discipline of churches or other voluntary societies, so long as they keep within the reasonable application of their own rules. which were known to the members, or night have been learned by them, upon reasonable inquiry, at the time of conneeting themselves with the society or church. In applying the proposition to the Roman church, we must not be underateed to imply that all possible applieations of the rule in that direction would be justified. If that church, acting upon its recent assertion of the destrict of infallibility, as implying not mere finality (a form of infallibility which exists in all tribunals of last resert, because there is no appeal), but also perfect wiedom and truth: M, we say, that church, acting upon the modern definition of infallible wisdom in its head, the Pope of Rome, should attempt to revive in this country some of its obsolute usages and diseleties. Who the Inquisition, and seriqualy set about instituting an ente de so in one of our towns or cities, unon the ground that what was once recogpleed by infaltible authority was most , and it for all times, we have no dealt the civil authority would disperse the procession as a mob and a naisence, if, Indeed, that work were not enticipated by the public expression of the popular will in some loss regular from No. doubt the civil law will protect the membors of that charch from being burned at

the stake for heresy, and equally from any corporal infliction of discipline, by way of penance or otherwise, notwithstanding any authority it might be able to produce from its archives of decretale. that such had been the general practice of the church in former ages. We do not mean to say that, if any member of the Roman shurch should persist in remaining with them after full notice of the revival of the ancient discipline of corporal chastisement by way of ponance, that the civil courts could relieve Man from submitting to the established discipline of his church, after fair notice of what it was to be. But if the revival was sprung upon him unawares. he certainly would have the right to retire, and if the church refused to let him and inflicted stripes against his will, it would be open to action for the asseult and battery. All that we futend to imply by our proposition upon this subject is, that the members of that church, in continuing to act with it and to support its worship, by giving money to build churches and to maintain public worship, most be considered as assenting to such donations being used in the same manner constantly practised by the officers of the church in this age and country. And that is all that is reentred to sestain the decision of the court in the principal case. This is the same rule we apply to all churches, and, indeed, to all voluntary societies.

Money given absolutely and unconditionally to build churches, in any church or society, is not affected with any implied trust except that it shall be applied to the purposes for which it was given, according to the laws and usages of that particular church or society. There is no pretence of any resulting trust to the donor in such cases. That only exists where the purchase-money is paid by one, and the title taken in the name of another, for the sale baselt of him who paid the prior: Finsh v.



Find, 15 Yes. 48-50; Lewin 183, and cases ched. This case presents not the respected enalogy to resulting treat. If that were so, the persone giving money, absolutely and unconditionally, to build charches, or schools, or hospitals, or for any other charitable pur-2000, would really own, in the simple, the entire institutions thus dedicated to charity, an aboundity which needs only to be stated to be rejected by all, for there can be no such thing as a resulting trust of this special character attempted to be maintained in the principal case. Resulting trusts are always and only of the entire tide in the subjest of the trust, and only to the denor or denote, or, more properly, the. owners. For, in the case of a resulting trust, there is no gift and no purpose of charity, or public bonefit of any kind, but stuply and only of purchase, and private and exclusive ownership. which is as remote as possible from every feature of the present case.

The present case seems to us, judging from the provisions and especially the prayers of the bill, to have originated in a missenception of the powers and duties of courts of equity, not very uncommon, even among tolerably well instructed members of the profession. view that it is competent, by means of injunctions, or, at all events, by resert to a receivership, to operate a railway or a church, or almost any other organiza-Man, under the direction of the court, for an indefinite period. We know that this has sometimes been attempted in our country, and there are, melancholy instances of operating railways for the period of a generation, possibly, in some partiens of the country, by manne of receiverships in chancery. But nothing of that kind is ever attempted to England, or sould ever he accomplished there. And it is done here only by an entire perversion of the powers of a court of equity, or clos by a calpable

ent in the shortest possible time. The party aggricand can only suck redress. ardinarily, from the power of the corperation or organization to which he has committed himself and his interests, and falling in that, he must be consent to bear his burdons, and all the civil eserts one properly do in such cases is to guaranty the members of churches and other organizations of which they are retuning members a free departure, and that they shall not safer any fereible indiction at the hands of the officers of such churches or sectories. being themselves ready and willing to depart in peace. This is abundantly shows in reparted decisions to the English courts of equity, as well to the court of last report as in all the subordinate tribunals: Orr v. Glasgow Rathway, & Macqueon Ho. Lds. 799; S. C., 6 Jur. M. S. 977; Brews v. Monmouth Mailway, 18 Boar. 83. In the case of Adley v. The Whitstable Ca., 17 Vec. 318, 328, the Chanceller, Lord ELBOY, exemined this question very carefully, and came to the exactuation that, in some few entreme eases, it might become indispensable for courts of equity to assume the control of ratiways, and other corporate organizations. for healted periods, by way of receiverships, in order to enforce bloos or judgments, but none of the instances adduced bear the remotest analogy to the case under review. The subject is extensively examined in Davis v. Greek 16 Wallace 200 1 see also Ellie v. B., H. & C. Boilman, 197 Mass. 1. The easts are nemerous and all in one direction, showing that courts of equity will not attempt to direct the internal management of corporations, even of a eventoreial and business character, except in very extreme cases. And it requires no argument to show the unressonableness, and even aboutday, of asking a coast of equity to assume the administration of the percebial departneglect to terminate a temperary expedi-

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country, an organisation as capable of administering its own offices as almost eny other in the country, and whose rules and discipline are as clearly defined, and uniformly administered, in all places, as any other, and in regard to which no member could ever fairly complain of surprise, after having been treared within its limits, as the petitioners here seem to have been.

The truth unquestionably is, that the order and discipline of this ancient church is somewhat as variance with the free spirit of the age and country, and with the rationalistic tendencies of our Protestant faith; and this contrast between that stable church and the restless activity of the age and country, is tending more and more, every year, to unsattle the quiet contentment of spirit of the more enterprising members of that venerable communion, thus begetting a desire in the more unquiet to grasp the roins away from the established hierarchy and drive the charlot in their own way and manner, not doubting, probably, to be able to effect vast improvements, much as Phaston attempted to drive the charist of the Sun, to his own discomfiture and the horror of the dwellers below. This restlessness of spirit which pervades all minds, more or less, in our widely-extended country, is nowhere more ardent or sincere than in the ieneral desire among some of the Protestant sects to reform the Roman church. This is a very natural and, within proper limits, a commendable continent, to extend our own light and Morty to others. But the attempt to compace the result by appeals to the sivil courts, is one that can never resolve the countenance of any wise and predent friend of constitutional government. It has already received more countenance in our country than is onthely creditable to our courts. Thus, in O'Bear v. Do Gessbriand, 23 Vt. 800, the exect adopted a principle the full extent of which was not probably

comprehended by them, but which, in fact, would have justified the interference of the court, in the case under review, to the full extent it is invoked in the bill. The court, in the last case cited, atterly ignore the cardinal principle of all voluntary societies, that the members, in becoming and continuing such, voluntarily consent to hold all their rights and privileges subject to the rules of the organization, one of which in the Roman church is, that the priests and bishops exercise a perfectly despotic authority in modelling and remodelling the places of public worship at will; and any one who purchased a sitting, in a particular place in any Roman church edifice, must be regarded as virtually consenting to the rightful authority of the bishop to modify or remove such sittings at pleasure. This consideration, which was decisive of the Vermont case, and of all cases coming within its operation, seems to have been wholly overlooked or ignored by the Vermont court. A very similar spirit seems to pervade the decisions in some other cases where the interests of the Roman church have come in controversy: Minor v. The Board of Education, in Cincinnati, in the Superior Court, reported m a separate volume. We should be glad to believe that these decisions were wholly above the inflaence of partison prejudice, as much as we feel the decision under review to be, or as that of the Board of Education v. Minor, 23 Ohio, N. S., 211-284, undoubtedly was, where the decision below was reversed upon the clearest grounds. But there are few educated minds wholis incapable of wresting argument and reason toward the accomplishment of some great good, even in the rest of judiciel administration. We almost unconsciously hend the arguments and resease to most our own desires.

And there are, no doubt, a very large number of educated and well disposed persons who convince themselves, without much careful study or reflection, that the provisions in our American Constitution, guarantying freedom of religion to every member of the community, in some indefinable way or manner, must seeme every one from all oppression or abuse in his own church or communion. But slight examinetion of these provisions will convince all, that they were only intended to secure persons freedom of selection in regard to the church or society where they will exercise religious privileges, and to what extent they will contribute to its support. These provisions are all much the some. For instance, in New Hampshire, the state immediately in question: "Every individual has a natural and inclienable right to wership God according to the dictates of his own conscience and reason, and no person shall be hurt, molested or restrained in his person, liberty or estate for worshipping God in the manner and reason most agreeable to the distates of kie own conscience." In Massachusette : " No subject shall be hurt, molested or restrained in his person, liberty or estate, for worshipping God in the menner most agreeable to his conscience." New York : "The free exercise and enjayment of religious profession and worship, without discrimination or proforever be allowed in this state to all mankind." Pennsylvania: "All men have a natural and indefeasible right to worship Almighty God according to the distates of their own consciences." Ohio has it in almost the precise words of Pennsylvania. In short, the substantial import is the same in all the states. It amounts to a deciaration against any established church or state religion, and there is no implication or bint that the legislatures or the courts are to be charged with any supervision of the occlesiastical administration in particular churches, in order to secure this liberty of conscience. There constitutional declara-

tions seem rather to prohibit than encourage any judicial interferences with the internal economy of the churches. since that could not be done without abridging the liberty of the majority of the members who did not complain. That is sufficiently secured by the right to elect and change one's own shurch relations at will. And we trust the time is fast coming in this country when no one will attempt to invoke the aid of the arm of the civil law, in any form, either to promote or binder any . religious denomination in the perfect freedom of its action. We hall the present decision as an advance, in very temperate measure, in the right direction.

We have said nothing of one complaint in the bill, i. a., that of the priest scolding or cursing the members for assumed defection of duty, for there was no proof upon this point. But If there had been, it is nothing for which the courts sould give reduces, unless to amounted to slander. And to have that effect, it wast appear, not only that the charges were false, but siles melicions. and that the priort upod the shield of his office for the more purpose of wanted defamation. And although it is very common for all ministers. Protestant on well as Roman, to admonish their hoseers, in no very moderate terms, of their shortcomings in duty, it is presumed fourcases will eccur where it amounts to slander, as defined above. In the majority of cases, it will, no doubt, be found that the reproof was founded in trath and justice. We have not adverted either to the fact that the New Harmshire Constitution, in terms, regulars that "the governor, councillury, constors and representatives must be of the Protestant religion," and that the courts have construct this to be a "qualific test," and "not morely the negative qualification of that being a Raman Catholic:" Bule v. Bourett, 30 Hi H. S.

We cannot see that this had any particular bearing upon the question before the court. It would rather lead us to expost hard measure for Reman Catholics in that state, and may thus, in a measure, explain why such a suit should have been instituted, and why many persons there seriously expected its success. And it may rather tend to increase our admiration of the better spirit prevailing in the courts of that state. The court, in People v. St. George's Society, 38 Mich. 361, adopt the view of non-interference with the internal administration of voluntary societies, and, as before suggested, we trust it is that becoming the general sentiment of the country. All that our people require in each matters is proper instruction and to be fairly dealt with. The mass of the people are always prompt to accept the truth, if they only know what it is.

I. F. R.

Supreme Court of Rhode Island.

JOHN H. WATSON . BENJAMIN TRIPP, TREASURER OF THE CITY OF PROVIDENCE.

Tax-payers are disqualified at common law for jurors in cations against the municipality.

The charter of a company operating care drawn by horse power upon tracks hold in the streets of a city provided that said corporation chould keep in repair such portions of the streets as should be occupied by their tracks, and should be Hable for any less or injury that any person shall sustain by reason of any carelessness, neglect or misconduct of its agents and servants, in the management, construction or use of said tracks or streets; and in case any demage shall be recovered against said towns or the said city, by reason of any such misconduct, defect or west of repairs, said corporation shall be Hable to pay to such towns and alty respectively, say sum thus recovered against them, tegether with all costs and reasonable expenditures incurred by them respectively, in the defence of any such suit or suits in which recovery may be had; and said corporation shall not encounher any portion of the streets or highways not occapied by said tracks. In an action against the city to recover damages for injuries caused by a defective highway, which was made unsafe by work done by the railroad company on its track t Hold, that the sity was liable for neglecting to keep its streets safe and convenient for public travel; that the duty, resting upon a town or city, to keep its highways eats and convenient, is a public duty, and that it has no power, unless authorized by statute, to divest itself, either by contract or ordinance, of its capacity to discharge this duty.

Simile, that the liability of the railroad company, as above stated, is a matter which may be considered by the jury in determining whether or not the city has been guilty of any extpalls neglect or want of reasonable care.

Thus was a motion for the new trial of an action in which the plaintiff recovered a verdict for damages against the city of Providence, for the alleged neglect of the city to keep one of its exceets safe for public travel.

Francis W. Miner, for plaintiff.

Charles H. Parkhurst, for defendant.

The opinion of the court was delivered by

DURFER, C. J.—The first ground assigned for a new trial is the exclusion of certain jurors from sitting as such in the trial of the case, because they were tax-payers in the city. The defendant admits that at common law such an interest would disqualify a juror, but claims that the common law has been changed by statute: Gen. Stat R. I., c. 189, \$4 1 and 2 The first of the two sections referred to declares who shall be liable to serve as jurous; the second, who shall be exempt from service. The two sections are obviously designed to define the liability to jury service as a general duty, and not with reference to specific cases. The provisions have long existed without change, except in the list of exemptions. The practice has always been to inquire of the jury, when our pannelled, if any one of them has formed or expressed an opinion, or is related to either of the parties, or is interested in the event of the suit; and to excuse any jurer who answers either of the questions in the affirmative. If the defendant's view is correct, the practice is erroneous. We think the defendant's view is not correct. A person may be liable to jury service under the statute, and yet be disqualified from service in a particular case by reason of interest, relationship, or the bias of an opinion already formed or expressed. The very jurers who were excused from service in this case, because they were interested as tax-payers in its decision. were nevertheless liable to service in other cases, and doubtless performed it. The first ground assigned for a new trial cannot be sustained.

The second ground is a raling in regard to the liability of the city of Providence. It appeared in evidence that the defect in the street which was complained of by the plaintiff was caused by work doing upon a railway truck laid in the street by the Union Railroad Company. The charter of the company contains the following provision:—

"Baid corporation shall put all streets and highways, and every portion thereof, over or through which they shall lay any rails, in as good condition as they were before the same were laid; and they shall keep and maintain in repair such pertions of the streets and

kighways as shall be occupied by their tracks, and shall be liable for any loss or injury that any person shall sustain by reason of any carelessness, neglect, or misconduct of its agents and servants, in the management, construction or use of said tracks or streets, and in case any damage shall be recovered against said towns or the said city, by reason of any such misconduct, defect, or want of repairs, said corporation shall be liable to pay to such towns and city respectively, any sums thus recovered against them, together with all costs and reasonable expenditures incurred by them respectively, in the defence of any such suit or suits, in which recovery may be had; and said corporation shall not encumber any portion of the streets or highways not occupied by said tracks."

The counsel for the defendant claims that the effect of this provision is not only to charge the company with the duty of keeping in repair such portions of a street as they occupy, but also to discharge the city, and, on the trial, he requested the court so to rule. The court refused to comply with this request. This refusal is assigned as a second ground for a new trial.

The prevision contains within itself convincing evidence that the construction contended for was not contemplated by the legis lature. It provides that in case any damage is recovered of the city for any such defect or want of repair, the company shall be liable to reimburse it. If, however, the city were relieved from the duty of repairing, no judgment could be recovered against it for not repairing. The counsel suggests that, though the city is relieved, it is not so absolutely relieved but that it may be liable where the company is guilty of a persistent neglect which is brought to the notice of the city, and that the remedy over is given in view of a case of that kind. If this be so, it does not follow that the court has erred; for the court was requested to rule that the liability of the city was not simply qualified, but discharged. The suggestion is, however, in our opinion, inadmissible, except perhaps to this extent: that the liability of the company is a matter which may be considered by the jury in determining whether or not the city has been guilty of any culpable neglect or want of reasonable care. We think the provision charges the company with a duty which, if duly performed, so far relieves the city, and with a responsibility which, if the duty is neglected, secures the city against damages, but at the same time leaves the liability of

the city towards the public without qualification, except as above The duty of keeping a street safe and convenient is not so exclusive that it may not be obligatory on both the city and the company. Instances often occur in which such a duty is common to a city or town, and an individual or corporation. Thus a man may lawfully deposit his wood or coal upon a sidewalk for a short time while in transit to its place of storage. But he must remove it, and, if he neglects, the city must remove it, without unreasonable delay. If the removal is neglected, and any person is injured in consequence, such person may sue either the city or the individual; and the city, if sued, cannot excuse itself upon the ground that it was the duty of the person who created the obstruct. tion to remove it, though it may recover of such person the damages to which it is subjected. So, where a railroad company is charged with the duty of repairs, it has been held that the town may still be bound. In Currier v. Lewell, 16 Pick. 170, a railroad company, when crossing a highway with its road, was required so to construct its road as not to obstruct the safe and convenient use of the highway. The statute also provided that the company might raise or lower the highway; and that, if the highway should not be so raised or lowered as to be satisfactory to the selectmen of the town. the selectmen might require the company, in writing, to make the alterations, and that if the company neglected to comply, the selectmen might make the alterations and recover indemnity from the company. The plaintiff in passing on a highway was thrown into an excavation made in the highway by the company. The town was held not to have been relieved of its liability. So in Willard v. Newbury, 22 Vt. 458, it was held in a similar case that the town was not absolved from liability. And see Batty v. Dusbury, 24 Vt. 155.

In Vinal v. Dorchester, 7 Gray 421, the case of Currier v. Lowell is said to carry the liability of towns to its extreme limit. In later cases in Massachusetts it has been held that the town is relieved when an individual or corporation is charged with the duty of maintenance and repair: Sawyer v. Northfield, 7 Cush. 490; Davie v. Leominster, 1 Allen 182; White v. Quing, 87 Mass. 430. This exemption, however, is placed upon the ground that by the present statute of that state the liability is not showlets, but qualified, and does not arise where other sufficient prevision for repair is made. In this state the liability is not subject to any such qualification.

In Lowell v. Preprietore of Locks & Canals, 104 Mass. 18, and Preprietore of Locks & Canals v. Lowell Horse Railroad Corporation, 109 Mass. 221, the Supreme Judicial Court of Massachusetts had occasion to pass upon a statute similar to the statute under which the defendant claims exemption. The court was of the opinion that the city was not relieved by the statute. "It authorizes," says the court, "for the public benefit the use of the highway for a peculiar mode of travel on certain conditions. The city may enforce the performance of the conditions; but all the provisions of the statute imply that the city is primarily liable for want of repair:" 104 Mass. 28.

In City of Philadelphia v. Weller, 1 Leg. Gas. Rep. 400, an action was brought against the city of Philadelphia for an injury resulting in death, occasioned by a hole between the tracks of the Richmond and Schuylkill Passenger Railway Company on Girard avenue. The company was chartered subject to the city ordinances, one of which provided that all railroad companies should be at the expense of maintaining and repairing any street occapied by them. It was claimed on the part of the city that the railroad company was primarily and exclusively liable for the accident. But the court held that city and company were both liable, and that, whichever was sued, the action could be maintained.

We think, in view of these authorities and of the implication contained in the provision cited, we cannot decide that the city of Previdence, in so far as any portion of its streets is in the occupation of the Union Railroad Company, is, to that extent, discharged of its liability to keep them safe and convenient for the public travel. The second exception is therefore everraled.

The petition for a new trial alleges other exceptions. We are, however, of the opinion that the exceptions alleged cannot be sustained. They rest upon the claim that certain ordinances, under which the street was occupied by the railroad company with their rails, constitute a contract with the company, and that, by virtue thereof, the city has no power to remove any anisance or obstruction in that portion of the street which is occupied by the railroad track without previous notice to the company to remove the same, and a neglect on their part for ten days to comply with the notice. We down it unnecessary to decide whether the ordinances do or do not constitute such a contract, for if they do, the contract is, in our

copinion, atterly void. The duty, resting upon a town or city, to keep its highways safe and convenient is a public duty. A city or town has no power, unless authorized by statute, to divest itself of its capacity to discharge the duty, either by contract or ordinance. We find no statutory authority for such a contract or ordinance in the case at bar. The exceptions are everywheld.

Another ground assigned for a new trial is, that the verdict is against the evidence and the weight thereof. It is claimed that there was no neglect on the part of the city, the defect in the street being indicated by a light suspended over or beside it. There was a conflict in the testimony upon the point whether there was such a light. The testimony to prove that there was a light was certainly very strong; but, even if conclusive, the jury may have thought that it was not properly placed, or that, in the particular circumstances, a single light, unless of more conspicuous size and brilliancy, was an insufficient enfoguard. The question was possibility a question for the jury; and the court, even though they may not agree with the jury, ought not to disturb their verdict without very weighty reasons. In the case at her we allow the verdict to stond.

A new trial is referred.

Court of Commissioners of Alabama Claims.

BUCK AND SPOTFORD BY AL., CLAIMANTS, O. THE UNITED STATES.

Where a versel has sailed under a charter-party with earge aboard, she is contiled to not freight for the whole voyage, in accordance with the terms of the charter, though destroyed by an insurgent cruiser, when but one day out.

Where destroyed while sailing in bailast, under aborter, to take in earge at her port of first destination, to be carried thance to a port of final destination, she is entitled to not freight on the earge which she was thus to have taken on board.

Where destroyed while sailing under one charter to deliver, at a designated part, earge on board, and to bring other earge bosts, she is estitled to not freight for the round trip.

Where destroyed while stilling under two distinct and independent charters, to early under the first, earge to an intermediate port, and under the second, to early other earge to a port more distant, she is antified to use freight under each charter. though destroyed before the falliferent of the first, if she has made it excludestrily to appear by proper proof, or necessary legal presemption, that she extend fairly at the same time on the semannecessest and presentation of but yayages.

The provisions of the Ast of Congress of June 204 1874, that this court shall not allow any claim for encurted or prospective fieldits or profits, do not change the frequing principles of commercial latt.

This was a claim arising out of the destruction of the ships Highlander and Jabes Snow. The facts are sufficiently stated in the opinion of the court, which was delivered by

PORTER, J .- In the case of the ship "Winged Racer," we were called to consider, among other subjects, a claim for the loss of freight. After a protracted argument by eminent counsel, we reached in that case conclusions which were, and are, satisfactory to the minds of a majority of the court. In the cases above mentioned, some new phases of the question, growing out of a different state of facts, were presented. This led the counsel of the government to insist on re-arguing the original questions decided in the "Winged Racer;" and, specially desiring to be right on a point involving so large a part of the money paid by Great Britain, we accorded this privilege, both to them and to the counsel of various claimants. I am now to state the views entertained by the court, after listening to these elaborate and learned arguments, and then to apply the principles we have adopted, to the solution of the questions presented in the cases of the "Highlander" and the "Jabes Snow."

The government of the United States presented at Geneva a large claim for the loss of freights. The British experts launched pointed and severe criticisms at the claim made for gross freights, but they could not deny the soundness of the claim for net freights, if the conduct of Great Britain had rendered her liable for the acts complained of by the United States. In the award made in ear favor, this principle was set forth as one of the conclusions of the tribunal, that, "in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to est aside all double claims for the same losses and all claims for gress freights, so far as they exceed net freights."

When the Act of 28d June 1874 was framed, Congress, following out this principle, gave to this court the following direction (seet. 12): "And in no case shall any claim be admitted or allowed for, or in respect to, uncarned freights, gross freights, prospective profits, freights, gains or advantages." The term "prospective," it will be observed, is predicated here, not only of profits, to which it stands in juxtaposition, but also of freights, gains or advantages. We are not to allow a claim for uncarned freights, gross freights or prospective freights; thus, by excluding all other kinds of

freight, permitting, and, indeed, requiring us to allow claims for net freight. That is, from the freight which a vessel, when 'dostroyed, was engaged in carning, must be deducted the expenses which she would thereafter have incurred if the voyage had been successfully accomplished. By the immediately preceding section of the act, we are required to decide upon the amount and validity of such claims, not only in conformity to the provisions of the statute, but according to the principles of law. We are to exclude profits, freights and gains which were prespective, and freights which were unearned, and we are to do this, not in some arbitrary way dictated by our own sense of justice, but according to the principles of jurisprudence as established by courts of law and adopted by the maritime nations of the world. We know, and we have known from the beginning, the importance of reaching a sound conclusion on the question thus arising both out of the treaty and the statute. During the argument, we have been properly reminded of the influence which our decision may hereafter exercise on the public interests. It is said that the United States expects to carry out in the future, as she has in the past, the doctrine of neutrality. It is reasonable that the principles adopted in the distribution of the money awarded at Geneva should be applied to her, if she should ever be held responsible for violating those important rules established by the 6th article of the treaty. defining the duties of a neutral government in preventing the Stting out, within its jurisdiction, of vessels intended to carry on war against a power with which it is at peace.

What, then, is "prospective freight," as employed in the award and in the statute? A plain illustration may supply the answer. The owner of a ship at Philadelphia, finding her out of cumployment, concluded that if he were at the Chincha Islands, he would be sure of a profitable cargo to Liverpool or New York. He preceeds, without any contract, written or verbal, equips his ship, sets sail, is captured by the Alabama, and sees his own ship sent to the bottom. He files his claim in this court, shows the law of the vessel, proves her tonnage and the customary freight, and offers the testimony of shippers in Callao, who state that if she had arrived there, they would have supplied a cargo equal to the carrying capacity of the ship. He exhibits his calculation, showing the necessary deductions from the gross freight and asks the payment of his claim. We decline to allow it, and toll him this was what:

the award meant when it declared that "prospective earnings cannot properly be made the subject of compensation;" and this is what the Act of Congress meant when it provided that a claim should not be allowed for or in respect to "prospective profits, freights, gains or advantages." Having thus found a distinct subject-matter to which this portion of the statute is applicable, we ought, by well-settled rules of interpretation, to rest content that we have ascertained the kind of profits which Congress meant to define by the term "prospective."

What are "unearned freights" as employed in the act? What do these terms, so unusual in the language of judges, shippers, carriers and underwriters, require us to exclude? By forbidding the allowance of unearned freights, it was certainly not intended to allow only freights fully earned. Freight is fully earned in the judicial, as well as popular sense, when the vessel has reached her port of destination and the cargo has been delivered-a place in which she would not be in much danger of destruction at the hands of an insurgent cruiser. If so destroyed, the question of freight could not have arisen at all, for her charterers would then have been her debtors, and the value of the vessel only would have been lost to her ewners. It is impossible to suppose that Congress could have put so frivolous a thing into a serious statute. It is just as clear that freights wholly uncarned could not have been intended, that is, where no expenses had been incurred, no stores supplied, no cargo taken en board, nothing done by shipper or owner towards the commencement of a voyage. Here, again, the vessel would have been found in her dock and out of the reach of the losses of which the statute treats. Even if she were not, her case is effectually provided for by forbidding any allowance for prospostive freights. The provision respecting "uncarned freights" was evidently intended to embrace something different from that of the inhibition of prospective gains, and to have some practical effect on the distribution of the money in hand. Let it be observed, then, that between these extremes—of freight wholly earned and freight wholly uncorned-there is an ample territory in which judicial investigation has gone on from the dawn of commerce to the present hour, and the results are found along the whole track of the commercial law. A ship is made ready for sea, a charterparty more or less formal is executed, her cargo is shipped and she starts on her voyage. She has not then serned her freight,

and on the shipper or charterer she has no legal claim until after the lapse of many months and the endurance of many perils. But her owner has spent time and labor in fitting her out, has supplied the necessary stores, advanced the wages of the crew, and subjected her to the largest risk to which property is ever subjected, or paid to others the required compensation for assuming such risk. Can it be maintained that her freight is uncarned, in the large and general sense in which this term is used in the statute—uncarned, without qualification—wholly uncarned? Can it be denied that some part of it has been carned? Not as against the shipper, if he has done nothing to change the cuntract, but even as against him, if he has interrupted the voyage, and certainly as against every one who wilfully er carelessly stope her progress. Here the decisions, European and American, have an uniformity scarcely to be met with in any other department of the law.

The ship Cambodia miled under charter from Bombey in ballast for Howland's Island, intending to call at a port in New Zeeland for water, and having got on shore on the coast of New Zealand. was so damaged that she was obliged to abandon her veyage. Lord C. J. Cockburn (afterwards one of the arbitrators at Geneva) held, that as the ship had sailed with the sole object of going to Howland's Island, to earn freight thence to the United Kingdom, the interest in the freight had commenced, although not a pound of the cargo was on board when she struck: Barber v. Floming. Law Rep. 5 Q. B. 59. True, this was an action on a contract of marine insurance, created by parties who could make their ewn terms, and we ought to look for precedents arising outside of the law of contracts altogether. Take, then, the case of a general average arising from the jettison of goods for the common safety of ship and carge. Here Mr. Lowndes, citing Williams v. The London Assurance Company, 1 M. & B. 318, states the rule in these terms: "When a ship is chartered to fetch or carry a carge belonging to the charterer, the freight under the charter must contribute to the general average, whether or not the cargo is on board the ship at the time of the general average act; since the loss of the chartered ship, whether laden or not, would deprive the shipowner of his expected freight:" Lowndes on General Average 286. In the case of The Brig Mary, Judge SPRACUS carried out the doctrine, by holding that where, by a charter-party, a green n, ant divisible, was to be said as freight for a voyage out and

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home, the principal object of the voyage being to obtain a return cargo, and a general average occurred on the outward passage when the ship was sailing in ballast, the whole freight for the round voyage must contribute: Sprague's Decisions 17. Turning to cases of salvage, we find the same rule to prevail: The Nathaniel Hooper, 8 Sumner 542. It is true that Mr. Benecke differs from Sir WILLIAM SCOTT, in the view taken by the latter in the case of The Progress, Edwards 210, that where a ship goes out under a charter, to proceed to her point of destination, in ballast, and to receive her freight only upon her return cargo, the court is not in the habit of dividing the salvage (in which he is sustained by the case of The Dorothy Foster, 6 C. Rob. 88), but it is sufficient to observe respecting this difference of opinion, that no man of his age was of higher authority on maritime law than the judge who pronounced the judgment in that case. In the cases of collision of vessels the same doctrine prevails. Even the case of The South Sea v. The Clara Symes, Swaboy's Rep. 141, is really in harmony with the other cases, for although the claim for freight was there rejected, and the owner of the injured vessel was directed to pay the costs attending the claim which he had made for freight, yet this was because of the doubt that arose from the character of the vessel, whether the master could have carried out the charter-party, even had the collision not occurred. decision of Dr. Lushington in The Gazelle, 2 W. Rob. 279, and in The Arge, 1 Spink 875; the report of the registrar and merchants in The Canada, 1 Lushington 586, made under Dr. Lushington's own eye; the decision of Dr. Phillimore in The Orpheus, Law Rep. 8 Adm. 808, where the cargo was not on board at the time of the collision; the opinions of several of our eminent admiralty judges in America: Bark Heroine, 1 Benedict 226; Egbert v. The B. & O. Railroad Co., 2 Benedict 225, and the decisions of the Supreme Court of the United States in Wiltiamson v. Barrett, 18 How. 101; The Cayuga, 14 Wall. 270; The Favorita, 18 Id. 598; have placed on a foundation too solid to be shaken, the doctrine that the owner of a ship injured by a cellision, if not in fault, is entitled to recover her not freight from the ewner of the offending ship, if the performance of the charterparty be prevented by the collision.

Undoubtedly the closest analogies to the cases in hand are found in these of the capture of vessels as prize of war. It is true that

Great Britain did not admit her liability as a wrengdoor for the acts of the insurgent cruisers, and, indeed, by the first article of the treaty disclaimed it, but having negligeatly permitted the equipment in her own ports, of vessels which could have had no other object than the destruction of our ships, she was placed by the award in the legal attitude of having wrongfelly captured them. There are in the books few cases of the destruction of vessels taken as prize of war, for the reason chiefly that they are too valuable to the captor to be destroyed. One of the few is the case of Der Mohr, 4 C. Rob. 315, which was lost by the negligence of the prize-master, an officer of the British navy, while being taken into port, and the capters were held liable both for the ship and the freight, but relieved from liability by Act of Purliament. In The Copenhagen, 1 C. Rob. 289, seized in a British port which she had entered in distress to make repairs, Sir WILLIAM Scorr, in treating of the question whether freight was due from the owner of the cargo to the owners of the ship for the whole voyage or only pro rate itineris, thus speaks: " With respect to the freight some is admitted to be due, as the ship has brought her cargo from Smyrna through much the most considerable part of the voyage. But it is said that in matters of price the whole freight is always given, and for this reason, because capture is considered as delivery, and a captured vessel carns her whole freight. I have already said that this is not merely or originally a matter of prise; the ship was not brought in as such; she came in first from distress and was afterwards put upon the proof of her character. It is a case of a mixed nature, and the maxim that capture is delivery is not to be taken in the general way in which it is laid down. It is by no means true, except when the capter succeeds fully to the rights of the enemy, and represents him as to these rights. If a neutral vessel, having enemy's goods, is taken, the captor pays the whole freight, because he represents the enemy by possessing himself of the enemy's goods jure belli; and although the whole freight has not been carned by the completion of the voyage, yet as the capter, by his act of seizure, has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject him to the payment of the full freight." The case of The Martha, 8 C. Rob. 106; The Hamilton, S C. Rob. 107, and The Anna Catharice, 6 C. Rob. 10, recognise the sense destrine. In the asymment

before us, it was assumed that in no case of capture had freight been allowed where the earge was not on board at the time of the capture: but The Progress, Edward's Adm. Rep. 210, seems to present such a case. That vessel having sailed from England to Oporto, in ballast, under a charter-party for an entire voyage out and home, and having performed the outward voyage, was captured by the French in that port, and recaptured by the British and Pertuguese army under Wellington, before she had commenced her homeward voyage. After the capture she had been unladen; on the recepture, her cargo was in warehouse on shore. Salvage was sllowed on the whole freight out and home. By the decision in The Catharina Elisabeth, 1 Acton Adm. Rep. 809, freight was allowed to a neutral vessel, which had not actually sailed, though her cargo was on board. It must be admitted that the American decicions have not yet satisfactorily established here the English rule, and some of them are adverse to it: The Amsable Nancy, 8 Wheat. 546; The Anna Maria, 2 Wheat. 827; The Charming Betoy, 2 Cranch 64. The Societe, 9 Cranch 209, was the case of a neutral vessel sailing under charter-party to Amelia Island with cargo freight free, where she was to take on board such cargo as might be tendered to her, and while thus carrying British goods was captured by a naval vessel of the United States, then at war with Great Britain, and brought into the District of Georgia, where the cargo was condomned as enemy's property. Chief Justice MARSHALL certainly held the two voyages to be distinct, prehably much influenced by the division made of the freight which, as to one voyage, was to be free, but payable as to the other. In the comparatively recent case of The Nucetra Senora de Rogia, 17 Wall. 30, a Spanish steamer seized in 1861 as prize of war, at Port Royal, in which a huge sum was allowed to the owner for the ase of the vessel, there is some recognition of the English rule, which must seem to every one who carofully examines the subject, much more consonant to the whole system of the law of marine torts.

It certainly follows from this discussion that in the cases before in, the allowance of freight pre-rate itinerie peracti, so strongly indicted on by the counsel for the government, is out of the question.

1. There is nothing in the Act of Congress to justify it. We are not required to decide a case where the freight was whelly

carned, or one in which it was wholly uncarned, for neither the one case nor the other, as we have seen, could have arisen out of the depredations of the insurgent cruisers. Such acts came too seen for the one and too late for the other. We are called upon to decide cases occupying ground intermediate between these extremes. The statute, therefore, wisely said nothing about apportioning the freight.

2. We could not undertake to determine upon and allow freight pro rate itinerie where it had been partly earned and partly uncarned, without violating these principles of law which Congress specially cautioned us to observe. Left thus untrammelled by the statute in respect to the measure of freight due, we had either to take ground in opposition to what the most enlightened publicists have written on this subject, and the most distinguished jurists have approved, or to adopt principles which have thus acquired the sanction of the jurisprudence of the maritime world. It required little sagneity and less courage to do the latter.

8. If we had undertaken to split the freight into fractions, and to percel it out, we should have failed in everything except doing injustice. A practical eye will readily see this. Suppose the ordinary voyage of a sailing vessel to be thirty days. In ten days from the time of commencing to put cargo on board, she has completed, it may be, four-fifths of her entire earnings. Why? The costs of loading and payment of wages to officers and men, the supply of stores, and the other smaller and incidental but inevitable expenses, are the bulk of the cost of earning the entire freight. All she then requires is those propitions influences of the elements for which she is dependent, not on the power of man, but on the favor of Heaven. Divide the whole freight thus begun to be carned, according to the number of days out, or by any other rule, and not in one case out of a thousand would justice he done. Deduct that which one of these vessels, if not destroyed, must have expended between the point of her actual destruction and the port of destination (generally only the expenses of maintaining the crew, paying the port charges and delivering the carge), and you leave her owner just where every innecent man, whose person er property is attacked in violation of law, eaght by the law to be left; that is, as nearly sound and whole as if he had not been

. What, then, is the practical result of these destrines in the cases

before us? Where a vessel has sailed under a charter-party with cargo on board she is entitled to not freight for the whole voyage in accordance with the terms of the charter, though destroyed when but one day out. Where she was destroyed while sailing in ballast under charter to take in cargo at her port of first destination, to be carried thence to a port of final destination, she is entitled to not freight on the cargo which she was thus to have taken on board. Where destroyed while sailing under one charter to deliver, at a designated port, cargo on board, and to bring other carge home, she is entitled to not freight for the round trip. Where destroyed while sailing under two distinct and independent charters to carry, under the first, cargo to an intermediate port, and under the second, to carry other cargo to a port more distest, she is entitled to not freight under each charter, though destroyed before the fulfilment of the first, if she has made it satisfactorily to appear by proper proof or necessary legal presamption, that she entered fairly at the same time on the commencement and prosecution of both voyages.

On these principles we decided, in June last, the case of The Senera. She sailed from New York to Melbourne, and she was thence to sail to Akyab, in British India, to take on a cargo of rice and proceed to one of several designated European ports. The charter permitted an intermediate voyage in the China seas. Having made such an intermediate voyage to Hong Kong, she' left that port for Akyab, and was destroyed by the Alabama in the straits of Malacca. In the judgment entered in favor of her owners, we allowed net freight for the cargo not on board at the time of her destruction. So, also, in the case The Emma Jane, decided during the same month. The case of The Commonwealth, argued during the present month, affords an illustration of the application of the same principle. She sailed from New York for San Francisco with a large freight-list, and when about twentyeight days out was destroyed by the Florida. After she had sailed, and before receiving information of her destruction, her owners executed a charter, binding her to proceed from San Francieco to the Chincha Islands to take en guano deliverable at Hamburg. She had not sailed under the charter for the Chincha Islands. She had done nothing whatever under it. Her officers did not even hear of it until after her destruction. As to that charter, her gains were prospective, which the award declares

"cannot properly be made the subject of compensation, incomuch as they depend in their nature upon future and uncertain continguacies." We accordingly disallowed to her freight under that charter, but admitted her right to not freight on the voyage to San Francisco. We could not have done otherwise.

In the cases of the "Highlander" and the "Jabes Snow," now before us, we have as little difficulty in allowing the freight. The "Highlander" was to proceed under charter to Akyab, Rangeon or Bassein (with the privilege of an intermediate veyage to a port in India or China), to take on, at one of those ports, rice deliverable at Cork or Falmouth. She had performed the intermediate voyage, and was proceeding in ballast to Akyab for carge when she was destroyed by the Alabama. The "Jebes Snew" carried with her two charters, under one of which she sailed from Cardiff with coal for Montevideo, and by the other she was to precood thence to Callac to take on guano deliverable at Havra. She was destroyed by the Alabama, with the coal on board, before reaching Montevideo. So far as we can judge, after a careful: scrutiny of all the testimony before us, each of these vessels, at the time of her destruction, was proceeding in good faith in the actual execution of the contracts which she had thus lawfully assumed. We know of nothing more which either of them could have done in the prosecution of the respective voyages thus commenced and suddenly terminated by the act of the most successful of the insurgent cruisers. We accordingly allow to such of them not freight on the carge which she was thus proceeding to take on board when destroyed. While we do not agree with the claimants respecting the amounts which they are entitled to clama, these are the principles of law on which we have reached the conductors embodied in the judgments about to be entered.

Court of Appeals of Virginia.

VIRGINIA & TENNESSEE RAILROAD CO. v. SAYERS.

It to well settled that common carrière may, by contract or by notice, restrict their common-lew Habilities as mourers against purely accidental loss or injury.

But they cannot, even by express contract, avoid liability for negligence, nor limit at to gross negligence.

In an action against a railroad company for loss by negligenes, the declarations of a brakeman or a section-master not near enough to the time and place of the occident to be parts of the res parts, are not evidence. The rule as to declarations

ERROR to Circuit Court of Wythe county.

This was an action by defendant in error for damages for the destruction of cattle delivered by him to the railroad company for transportation. The material part of the contract contained in the bill of lading was as follows:—

"That, whereas the Virginia and Tennessee Railroad and connecting lines transport live stock only at first class rates, except when, on consideration of a reduced rate by the ear load, the owner and shipper assumes certain risks apocified below. Now on consideration of the acid railroad agreeing to transport the above-described live stock at the reduced rate of thirty-six dollars and eighty cents per car load, and a free passage to the ewner or his agent on the train with the stock, the said owner and shipper do hereby assume and release the said railroad from all injury, loss and damage or depreciation which the animals or either of them may suffer in consequence of either of them being weak, er escaping, or injuring thenmelves or each other, or in consequence of overlanding, heat, sufficution, fright, visiousness, or of being injured by fire, or the burning of any material, while in the possession of the company; and from all other damage incidental to railread or steamboat transportation, which shall not be established to have been eaused by the gross argligence or delinquency of any of the officers or agents of the said railroad or steamboat companies."

The opinion of the court was delivered by

Ownierian, J.—The instructions affered by both plaintiff and defendant, those refused and those given, raise the question whether a railroad company can limit its liability as a common carrier, by express contract, so as to excuse itself for negligence, unless such negligence amounts to grees negligence; in other words, whether it can by contract excuse itself from negligence at all. The court below held that it could not, that if the loss was occasioned by the negligence of the company or its agents, no contract they could make with the shipper or consignee, however plainly expressed, seed release the company. It is this judgment of the Circuit Court, thus expounding the law, we are first called upon to review.

This question is one of first impression in this state. While it has been the subject of much judicial discussion in England and many of the states of this Union, where the decisions have been to some extent conflicting, the precise question has never been decided by this court. We have, therefore, given to the subject a careful and candid investigation.

Refired companies are invested with the powers and subject to the liabilities of common carriers. At common law persons and corporations exercising such public employment, are, upon grounds of public policy, held to a stringent liability, which is not exacted of ordinary ballots. At common law, they are incurers, to a certain extent, of the goods intrusted to them, and are held responsible for all injuries thereta, except these caused by the act of God or the public enquies. The law which fixed these rights and obligations is of ancient origin and founded upon grounds of public policy. The exclusive presession of the property in the certies, the ordinarily exclusive presession by him of the means of

and robbem, and the entire reparation of the extner from his property during the transit, are some of the leading grounds of public policy

which gave rise to this extraordinary responsibility.

These rigorous rules of the coarmon law have been modified some. times by legislation and more frequently by decisions of the courts, to the extent that the carrier may by express contract limit his liability as as insurer. Thus, by an Act of Congress passed in 1851 in relation to sea-going vessels, ship-owners are relieved from all responsibility for loss by fire unless caused by their own durings or neglect; and from responsibility for hos of manny and other valuables named, naless notified of their character and value. And there is similar legislation in some of the states, as I am informed, but to whose statutes I have not access here. But the common hw rules have been relaxed in most of the states by the decision of the courts, to the extent of granting by express contract, or notice brought bome to the shipper, a limitation of their liabilities as incurers. Even the policy of such limitation has been doubted by learned judges and eminent writers on this subject. " As the duties and responsibilities of public carriers are prescribed by public policy, it has been seriously doubted," mys Mr. Justice BRAD-LEY (17 Wall, 850), "whether the courts did wisely in allowing that pelicy to be departed from without legislative interference by which led modifications could have been introduced into the law."

It would be an instructive and interesting investigation to trace the equees which led to the relexation of the rigorous rules of the common law, and to note how strenuously the courts for a long time resisted all attempts of common carriers to limit their common-law Habilities. It is easy to persoive that the medification of the common law grew out of the great hardship incurred by the carrier in certain special cases; for inctance, cases where goods of great value, or subject to extra risk, were delivered to him without notice of their character, or where losses happeaced by shear accident, without any possibility of fraud or collecton on his part, such as accidental fire, callinion at see, &c. Such cases as these led to a relaxation of the rule to the extent of authorizing certain exemption from liability in such cases, to be secured either by public notice brought home to the owner of the goods, or by inserting exemptions from liability in the bill of lading or other contract of carriage.

That a common carrier may limit his common-law liability to the an-

tent above indicated may now be considered as well settled.

But the important question is how far can be go beyond that? Can he secure by contract an exemption from Hability for acts arising out of his own negligence or that of his agents f. One he by contract limit his responsibility only to a case of grees negligence, as is attempted in . this core ?

In this state, as before observed, these questions have never been the subject of judicial investigation. We usual, therefore, look for authority to the works of emissent authors, which are the recognised test-books of the law on this subject, and to the decisions of the Supreme Court of the United States and of our pictor states, as well as the decisions of the Baglish sourts, and from these sources of high-authority settle the law upon this important question for this state.

Mr. Justice Super in his week on Relie

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pary negligence as well as for gross negligence, notwithstanding such notices (i. e., such notices as are brought home to the party, and thereby constituting an express contract). There are dicta by various judges, indicating that the common rule of ordinary diligence, in common cases of hire, is applicable to the case of curriers under notice. On the other hand, there are declarations of judges at nivi prius, as well as their epinions in base, which seem to put it as a question of gross negligence er not. The question may now be considered at rest, by an adjudication entirely satisfactory in its reasoning, and turning upon the very point, in which it was held that in case of such notices the carrier is liable for losses and injuries occasioned not only by gross negligence, but by ordimary negligence; or, in other words, the carrier is bound to ordinary diligence." The author, to sustain this view, refers to Wild v. Pickford, B M. & W. 461. Referring to that case, I find that Mr. Baron PARKE uses the following language: "Upon reviewing the cases on this subject the decisions and dicta will not be found altogether uniform, and some uncertainty still remains as to the true ground in which cases are taken out of the operation of these notices." After reference to a number of cases he says: "The weight of authority, hewever, seems to be in favor of the doctrine, that in order to render a carrier liable after such netice, it is not necessary to prove a total abandonment of that character, or an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence, which is gross negligence in the sense in which it has been understood in the last-mentioned cases."

Judge REDFIELD, in his valuable work on Carriors and other Bailees, § 156, says: "There is certainly something very incongruous and not a little revolting to the moral sense, that a bailer for hire should be allowed to stipulate for exemption from the consequence of his own negligence, ordinary or extraordinary. A laborer, domestic or mechanic, who should propose such a stipulation, would be regarded as altogether mowerthy of confidence in any respect, and the employer who should submit to such a condition must be reduced to extreme necessity, one would suppose." After an interesting review of the cases on the subjest, and after quoting the general rule of law upon this point as stated by Baron PARKE, in Wild v. Pickford, supra, the learned author remarks, § 163: "This seems to be placing the effect of such notices upon a reasonable basis, and most of the American cases will be found to have

adopted in the main similar views."

With this reference to, and extracts from, the works of STORY and REDFIELD, I come now to consider the case decided by the Supreme

Court of the United State and of the other states.

The question we are now considering has been more than once determined by the Supreme Court of the United States. The first case to be noticed is the case of The New Jersey Storm Navigation Company v. Merchants' Bank, reported in 6 Howard 344, and decided in 1848. The case was this, and grew out of the burning of the steamer Lexingten. Certain money belonging to the bank had been intrusted to Harden's Express to be carried to Boston, and was on board the steamer when she was destroyed. By agreement between the Steamboat Comrany and Hardon, the crate of the latter and its contents were to be at is sale risk. The court held this agreement valid on far as to excuerate be Steemboat Company from the responsibility imposed by law, but not to excuse them from misconduct or negligence. Mr. Justice Nasacu, delivering the opinion of the court, said: "Although he, the earrier, was allowed to exempt himself from losses arising out of events and accidents against which he was a sort of insurer, yet, incomuch as he had undertaken to carry the goods from one place to another, he was decided to have incurred the same degree of responsibility as that which attaches to a private person engaged eastally in the like occupation, and was therefore bound to use ordinary care in the custody of the goods."

The next case which come before the Supreme Court of the United States was Philadelphia & Reading Railroad Company v. Derby. That was the case of a free passenger-a stockholder of the company taken ever the road by the president to examine its condition—and it was contended in argument that, as to him, withing but " gross negligence" would make the company liable. Mr. Justice GRIER, delivering the opinion of the court, said: "When carriers undertake to convey persome by the powerful but dangerous agency of steam, public policy and safety requires that they be held to the greatest possible care and dillgence, and whether the consideration for such transportation he posseniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross':" 14 How-In a subsequent case this doctrine was reaffirmed "as resting not only on public policy but on sound principles of law:" Steambost New World v. King, 16 Howard 469-494. In York Co. v. Control Railroad, 8 Wall. 118, the same court, after conceding that the responsibility imposed on the carrier of goods by the common law, may be restricted and qualified by express stipulation, adds, "where such stipulation is made and it does not cover losses from negligence or missenduct, we can see no just reason for refusing its recognition and enfereement."

In the case of Express Company v. Ronnledge Brothers, the earriers were sued for the value of gold dust delivered to them on a bill of lading, excluding liability for any loss or damage by fire, not of God, enemies of the government, or dangers incidental to a time of war. The company was held liable for a robbery by a predatory band of armed men (which was one of the excepted risks), because they negligently and needlessly took a route which was exposed to such incursions. The judge at the trial charged the jury that although the contract was legally sufficient to restrict the liability of the defendants as common carriers, yet if they were guilty of actual negligence they were responsible, and that they were chargeable with negligence unless they exercised the care and prudence of a prudent man in his own affairs. The Supreme Court held this to be a correct statement of the law: 8 Wallace 242, 358.

The most recent case decided by the Supreme Court of the United States is the case of Railroad Company v. Lockwood, 17 Wallace 257. This case would seem to be exactly in point. It was a case of injury to a cattle drover travellising on a stock train upon a free pass, and when there was an express contract that he should take all rick of injury to the stock, and of personal injury to himself. The unanimous judgment of the court in that case established the following propositions, as hid down by Mr. Justice Baadany t 1. A common carrier cannot harfully signs

late for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. 2. It is not just and reasonable in the eye of the law to stipulate for exemption from responsibility for the negligence of himself or his corvants. 3. These rules apply both to sommon carriers of goods and common carriers of passengers. 4. They apply to a case of a drover travelling on a stock train to look after his cattle, and having a free pass for that purpose.

I have thus for given the adjudications of the Supreme Court of the United States upon the question under consideration, as well as the epinions of authors of recognised authority, to show that a common carrier cannot by express contract limit his common law liability to the extent of exemption from responsibility for the negligence of himself

or his corvents.

I come now to notice the course of decisions in the different states of the Union.

First, as to the decisions in the state of New York: Up to the year 1858, the source of decisions in that state had been in conformity with the principles announced in the cases decided by the Supreme Court of the United States above referred to. But in a case decided in 1858—Wells v. N. Y. Central Railroad Co., 26 Barb. 641—the Supreme Court of that state seems to have given its assent for the first time to the preposition that a common currier may stipulate against responsibility for the negligence of his servants; and this, contrary to the decisions before that time, may now be taken as the settled law of New York. See opinion of Mr. Justice Bradley, 17 Wallace 869. But this conclusion was reached against the earnest protest of some of the ablest judges of that state. And Judge DAVIN, in Elimson v. N. Y. Central Enilroad, 82 N. Y. 887, significantly remarks, in commenting on the recent decisions in that state: "The fruits of this rule are already being gathered in increasing accidents through the decreasing care and negligence on the part of these corporations, and they will be continued to be respect until a just sense of public policy shull lead to legislative restrictive upon the power to make this kind of contracts."

In Pennsylvania a long course of decisions settles the doctrine that a common carrier example by netice or express contract limit his Hability so as to excuerate him from responsibility for his own negligence or that

of his pervent.

In Furnham v. Camden Railroad Co., 55 Penn. St. 62, Chief Justice Thompson, delivering the opinion of the court, says, the doctrine is fewly actiled in this state that a common carrier cannot limit his liability, so as to cover his own or his servant's negligence. In Pannaylvania Railroad Co. v. Henderson, 51 Penn. S15, a drover's pass stipulated for immunity of the company in case of injury from negligence of its agents or otherwise. Judge READ, after a careful review of the Pennsylvania decisions, mays: "This endormement releases the company from all Hability for any cause whatever, for any loss or injury to the person or preparty, however it may have been occasioned; and our doctrine actiled by the above decisions made upon grave deliberation; declares that such a release is no excuse for negligence. See also 8 Penn. 479; 16 Id. 67; 30 Id. 842; 68 Id. 14.

In Obio the cases are very decided ed this subject, and reject all attempts of the carrier to etipulate against his own negligence or that

of his servants. In Devidson v. Grahem, 2 Ohio State 131, the court, after exaceding the right of the carrier to make special contracts to a contain extent, says: "He example, however, protect himself from leases excessioned by his own fault. He exercises a public employment, and diligence and good faith in the discharge of his dution are exceptial to his public duties. * * * * * And public policy farbide that he should be relieved by special agreement from that degree of diligence and adelity that the law has exacted in the discharge of his duties. See also Welsh v. Pittsburg, Pt. Wayne & Chicago Railroad, 10 Ohio 76; Jones v. Verhece, 10 Id. 145; 21 Id. 723; 10 Id. 1, 221, 260.

The decisions of the Supreme Courts of Maine and Massachmetts are to the same effect, by one unbroken surrent. To the same purport are the decisions of many of the other states, which time and space only permit me to mention possion, but which are well worthy of attentive permal and more particular notice. See 31 Ind. 394; 2 Rich. (So. Cor.)286; 28 Georgia 543; 37 Alubama 247; 39 Miss. 822; 20

Louisiana Ana. 302.

After this hesty review of the decisions of the American courts on the question before us, I will now make brief reference to the English

Up to the year 1882 the course of the English decisions had been uniformly against permitting a common carrier to contract for exemption of responsibility for loss or injury resulting from his own negligence or that of his servents. And nonnequently, in Mr. Justice Brown's work on Bailments, published in 1832, he correctly gives the state of the English law as stated supra. But between that time and the passage of the Bailway and Canal Traffic Act, passed in 1854, there was a change of opinion on the subject, and it was held in several cases that carriers could stipulate for exemption from liability, even for their gross negligence. See Over v. Lancushive Railroad Co., 7 Exch. 707; Pech v.

North Staffordshire Railway Co., 19 Ho Lorde Cas. 478.

In the last named case, decided in 1862, Mr. Justice BLACKBURK, after an able and interesting review of the course of decisions in Empland on this subject, and referring to Mr. Justice Stony's work on Bailments, published in 1832, quoted in the opinion supra, says: "In my opinion the weight of authority was in 1833 in favor of this view of the law, but the cases decided in our courte between 1833 and 1854 established that this was not the law, and that a corrier wight by a special notice make a contract limiting his responsibility even in the cases here servants; and, as it seems to me, the reason why the legislature intervened in the Railway and Canal Traffic Act of 1864, was because it thought that the companies took advantage of these decisions, in Stony's language, "to evade altogether the salutary policy of the common law."

In the same case, Lord Chief Justice Cockhun, referring to the case of Carr v. Laneaulite & Yorkshire Rullwood Co., supre, in which it was held that a common carrier might by express contract release himself from liability even for gross negligence, says: "In a very short time after the decision of this case was pronounced, the Act of Parliament was passed," known as the Railroad and Canal Act. "It cannot be decisied that the object of the legislature, in passing it, was to provest

these contracts, in which any liability for negligence is either entirely

excluded or made conditional on the payment of a premium."

The Railway and Canal Traffic Act, passed in 1864, adopted in consequence of these decisions, provides: "§ 7. Every such company shall be leads of, or any injury done to any horses, cattle or other animals, or to any articles, goods or things in the receiving, forwarding or delivery thereof, necessioned by the neglect or default of such company or its nervants, notwithstanding any notice, condition or declaration made or given by such company contrary thereto, or in any wise limiting such liability, every such notice, condition or declaration being hereby declared to be null and void."

It will thus be seen that by this Act of Parliament the salutary rule of public policy, which prohibits a common carrier from limiting his liability so as to exonerate him from the consequences of his own negligence, has been in effect reinstated in England, and the evils growing out of the change in the course of decisions and the departure from these wise and salutary decisions which had provailed in the English courts for more than half a century, had at last to be corrected by an Act of Parliament, restoring the older and better rule of law.

From this review of the American and English decisions I am constrained to conclude that the great weight of authority is in favor of declaring that the salutary rule of law and public policy, which forbids a sommon carrier from exempting himself from liability by express contract or otherwise for his own negligence, whether gross or ordinary, should be firmly adhered to and maintained by the courts of this state.

But it is argued with much force by the learned counsel for the appullants that parties have a right to make their own contracts; that it is no concern of the public on what terms an individual has his goods carried; that if he chooses to accept all the risks by paying less for the carriage, how does it concern the public, and what public policy does it violate; how are public morals or public interests affected? Is it not a restriction upon trade and commerce, and an invasion of personal rights, for the courts to interfere and to declare such agreements, voluntarily and deliberately made, and and void? Such arguments as these were also wreed in the case of Railroad Company v. Luckicood, supra, \$78, and were thus conclusively answered by Mr Justice BRADLEY, and I manet do better than to adopt his answer: "Is it true," he says, "that the public interests are not affected by individual contracts of the kind polerred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it loses it in their power to change the law of common carriers in effect by introducing new rules of obligation. The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in our court. His business does not admit such a course. He prefers rather to accept every bill of lading or to sign every paper the cerrier presents, often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business." These conent and just views of Mr. Justice BRADLEY are schengly illustrated by the case we have before us as the one he was pasidering. In this case the railroad company required the drover to

pay on his cattle as first-class freight unless he signed the contract. He therefore would have had to pay the enormous sum of \$6.00 per hea for each animal, or 5113 per car lead, instead of \$36. No drever see afford to pay these rates; and this case is a strong illustration of how completely parties are in the power of the railroad companies, and how necessary it is to stand firmly by those principles of law by which the public interests are protected. The inequality of the parties, the compalsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest such transaction of validity. The business of the common carrier is mostly concentrated in the hands of powerful corporations, whose position in the hody politic They do in fact control it, and impose such enables them to control it. conditions upon travel and transportation as they see fit, which the pul lie is compelled to accept. These circumstances furnish an addition argument, if any were needed, to show that the conditions improved by common earriers ought not to be adverse (to say the least) to the distatus of public policy and morality. Contracts of common carriers, Was the of aductaries, giving them a position in which they can take an undue advantage of the persons with whom they contract, must rest upon the fairness and reasonableness. It was for the reason that the limitation of liability, first introduced by common carriers into these notices and bills of lading, were just and reasonable, that the courts sustained the

It was just and reasonable that they should not be responsible for losses happening by sheer accident or the dangers of navigation, that me human skill could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles lial rapid decay, or for live animals liable to get maruly from fright, and to injure themselves in that state, when such articles or animals became fujured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to these without the violation of any important principle, although medifying th strict rules of responsibility imposed by the sommon law. The improved state of society and the better administration of the laws had dist ished the opportunities of collusion and bad faith on the past of the earrier, and rendered less imperative the application of the iron rule that he must be responsible at all events. House the exemptions referred to were deemed reasonable and proper to be allowed; but the proposition to allow a public carrier to abandon altegether his obligation to the public, and to stipulate for exemptions that are unreasonable an improper, amounting to an abdication of the essential duties of his enployment, ought never to be entertained.

I think, therefore, "that," to use the language of Chief Justice REDFIELD, "every attempt of carriers by general notices or special contract to excuse themselves from responsibility for lesses or damage resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and therefore based upon principles and a policy

which the law will not uphold."

But the learned counciel the the consilies in his ship comment is

behalf of the company, insisted that the law recognised different degrees of negligence, and it was legitimate for a common carrier to limit his liability to losses or damage from all causes except gross negligence, as was done in this case by express contract. I think an examination of the authorities will show that the distinctions between "gross" negligence and ordinary negligence are too vague and shadowy to be of any practical importance in the adjudication of questions of this sort.

The tendency of judicial opinion is adverse to any distinction between gross and ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the nituation demands, and hence it is more strictly negligence." The decided preponderance of authority is in favor of abolishing the vague and uncertain distinctions between the different degrees of negligence, and to hold the public carrier bound whenever it is shown that the less or damage is occasioned by negligence at all, whether gross or ordinary; or, in other words, the carrier is bound to ordinary diligence. See I Smith Lead. ('as. (7th Am. ed.) 453; Story on Bailments, § 571; Wyld v. Prekford, 8 M. & W. 460; 11 Id. 115; 2 Q. B. 661; 14 How. 486; 17 Wall. 388.

I am, therefore, of opinion that the Circuit Court of Wythe county did not err in giving the instructions which it gave the jury, of in refusing those which it refused to give, both sets of instructions presenting, in different forms, the question we have been discussing, and the said court having decided that the railroad company cannot by express contract exenerate itself from liability for loss or damage occasioned by the negligence (whether gross or ordinary) of its agents, servants or

employees.

There are now two other grounds of error assigned which remain to be noticed. First, as to the demurrer to the declaration; second, as to the admissibility of certain evidence offered by the plaintiff and admit-

ted by the court.

As to the first, it is sufficient to remark, that a careful inspection of the declaration shows that each count is a count in assumpeit, and no one of them in tort; so that, in fact, there is no misjoinder of counts as claimed by the counsel for the plaintiff in error, and the Circuit Court was right in overruling the demurrer.

The next ground of error assigned presents a more serious question, and requires a more particular notice. It is raised by the 3d, 4th and 5th bills of exception taken by the defendants, and presents the question whether the evidence therein set forth was competent to go to the jury.

It was proposed by the plaintiff to prove by the witness l'arish that he heard a negre brakesman, who was on the train with plaintiff's cattle, any, "that, had it not been for the brake on the East Tennessee ear, the train would have run off with them coming down the Allegheny mountains." This remark of the brakesman was made before the accident, and at Salom, a distance of forty-two miles from the scene of the disaster. It was further proposed, on the part of the plaintiff, to prove, by the witness Crockett, that he heard one Burroughs, who was a section-manter on defendants' read embracing the point where the accident occurred, any that "he (Burroughe) expected an accident on that part of the read where said accident did take place" This conversation took place

tiff were coming from Lynchburg, on a special train, back to the point of the accident; the said section-master, Burroughs, being on said

special train with them.

The question is, whether these declarations of the brakesmen and section-master were competent to go to the jury. The court below admitted the evidence. Was this error? It is insisted that these declarations were admissible, though hearmay, as the declarations of agents. It is true that, where the acts of the agent will bind the principal, there his declarations, representations and admissions respecting the subject-matter will also bind him, if made at the same time and constituting part of the res gests. They are of the nature of original evidence, and not of hearsdy, the representation or statement in such cases being the uititimate fact to be proved, and not an admission of some other fact. The arty's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of his agency in regard to a transaction then depending et dum servet opus. It is because it is a verbal act and part of the res grotes that it is admissible at all. It is to be observed that the rule admitting the declarations of the agent is founded upon the legal identity of the agent and the principal, and the declaration of the agent, to be admissible, must be part of the res gests: I Greenleaf, Rodfield's edition, sects. 118, 114; Story on Agency, sects. 134-137.

But it is argued, with some force, that these general rules do not apply to corporations which do their business entirely through agents, and that companies engaged in the transportation of freight and pessengers are responsible for the declarations of their agents and employees, through whose instrumentality their whole business is transacted. This is a striking view of the subject, and come few cases, it is admitted, may be found adopting this view. But Chief Justice REDFIELD, in his edition of I Greenleaf, p. 185, seet. 114 (a) and notes, has collected the authorities, and says: "In general such companies are not responsible for the declarations or admissions of any of their servants beyond the immediste sphere of their agency, and during the transaction of the business in which they are employed. Thus the declarations of the conductor of a railway train as to the mode in which an accident occurred, made after its scentrence, or those of an engineer made under similar circumstances, are not admissible." This is authority exactly in point. See, also, Griffia v. Montgomery Railroad Co., 26 Geo. 111; Robinson v. Fitchburg Railroad Company, 7 Gray 92.

In Leady v. The Hudson River Railroad Company, 17 New York Court of Appeals Reports 131, it was held, that the declaration of the driver of a car, after the car had stopped, assigning the reason why he did not stop the car and thus prevent the injury to the plaintiff while erossing the street, that he could not stop the car because the brakes were out of order, being made after the injury was inflicted end the transaction terminated, is not admissible against the company in whose employ such driver was, it being more bearney. See, also, to this same effect, Moore v. Meacham, 10 N. Y. 207; Lane v. Bryont, 9 Gray 245.

I think, therefore, upon principle and enthority, that the declarations of the brakesman and section-master, made at the time and under the

the brakesman and section-master should not have been examined as witnesses, and their declarations, not being made at such time and under such circumstances as to make them a part of the res gester, were more hearsay.

It is argued, however, that the evidence, if excluded, would not have changed the verdict of the jury, as the case was clearly made out without it. It is impossible for this court to estimate the effect which this evidence had on the minds of the jury, and it would be going beyond our

legitimate function to enter upon any such vain speculation.

The court erred in admitting the evidence, and it is our province, without speculating how the evidence might have affected the minds of the jury, simply to declare it inadmissible, and, for this error of the court, to reverse the judgment, and to remand the cause to the said Circuit Court, for a new trial, to be had there in accordance with the principles declared in the foregoing opinion.

ABSTRACTS OF RECENT AMERICAN DEGISIONS.

SUPREME COURT OF ILLINOIS.¹
SUPREME COURT OF KANSAS.²
COURT OF ERRORS AND APPEALS OF MARYLAND.²
SUPREME COURT OF PENNSYLVANIA.⁴

ACTION. See Contract; Fraud.

Successive Suite for accraing Damages.—For malpractice by a physician is setting a broken arm, successive suits cannot be brought from time to time, as damages in the future may be suffered, but the recovery is once for all, and may embrace prespective as well as accrued damages: Houselt v. Goodrick, 69 Ill.

AGENT.

What is necessary to make the act of an Agent done without authority binding upon his Principal.—To make the act of an agent, done without the authority of his principal, binding upon the latter, it is necessary to show that he subsequently ratified and adopted the act; and to make such ratification and adoption effectual as against the principal, it must be shown that he had previous knowledge of all the material facts; and if he assented while ignorant of those facts, he is at liberty to disaffirm the transaction when informed of them: Bannon v. Warfield, 42 Md.

Where an agent lends the money of his principal upon a security which preves to be insufficient, the judgment of such agent as to the value of the security at the time it was taken is not conclusive; evidence may be introduced, as reflecting on the question of the want of good faith and responsible care in making the loan and taking the security, to show

^{. 1} From Hon. N. L. Freeman, Reporter; to appear in 69 Illinois Reports.

From Hon. W. C. Webb, Reporter; to appear in 15 Kansas Reports.

From J. Shael Stockett, Keq., Reporter; to appear in 49 Maryland Rep.

France P. France Smith, Res., Reporter : to appear in 78 Pa. State Reports.

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that the value of the security was very much less than the estimate placed thereon by the agent: Id.

Proof of Authority.—While it is competent to prove a parele upway and its nature and scope by the testimony of the person who claims to prove any parol authority by the testimony of the person who claims to peacess such authority; yet it is not competent to prove the supposed authority of an agent, for the purpose of binding his principal, by proving what the supposed agent has said at some province time; nor is it competent to prove a supposed authority of any kind, as against the person from whom such authority is claimed to have been received, by proving the previous statements of the person, who, it is claimed, had obtained such authority: House Markins Co. v. Clark, 19 Kans.

ATTORNEY.

Costs and Expense growing out of his Wrongful Act.—Where an attorney, employed to transact certain business for his client, procures a third person to be invested with the legal title to property belonging to his client without any consideration being paid therefor, and the arrangement serving no beneficial purpose to his client, and he afterwards incurs expense in costs and attorney's fees in getting the legal title in himself instead of his client, he will have no legal claim to be reimbursed or allowed for such expenses, on bill for an account by his client against him: Hughes v. Zeigler, 69 Ill.

AUCTION. See Title.

BAILMENT.

Pledge—A security for whole Debt and every part of it.—In all cases a pledge is understood to be a security for the whole and for every past of the debt or engagement, unless it is otherwise stipulated between the parties. If several things are pledged, each in deemed liable for the whole debt or other engagement, and the pledgee may proceed to sall them, from time to time, until the debt or other claim is completely discharged. If anything perishes by accident or easualty, without his fault, he has a right over the residue for his whole debt or other duty: Baldwin v. Bredley, 69 Ills.

COMMON CARRIER.

When Liability of coases, and that of Warehouseman attaches.—Where goods have reached their destination either in the night time or on a Sunday, or where, for any other reason, the consignos is not ready to receive them on their arrival, and the carrier puts them in store, or in the charge of competent and careful servants, ready to be delivered when called for, the carrier's liability as insurer ceases, and he will thereafter be liable only as warehouseman, and if the goods are destroyed by five without fault on his part, he will not be responsible: Rutheshill v. Mich. Control Railroad Co., 69 Ill.

CONSTITUTIONAL LAW. See Buildense.

Local Option Laws—Delogation of Legislative Power—Mature of a License to sell Liquer.—Section 1 of the Act of 1874, ch. 488, provided for an election to be held on the second Transley in July 1871, # at which the voters of the several election districts in the counties named, should east ballets "for the sale of spirituous or fermented liquors," or "against the asle of spirituous or fermented liquors;" and directed the judges of election should make return of the votes to the judges of the Circuit Court, who should make proclemation of the result. Section 2 exacted that if it should be found by the returns of the judges of election, and proclamation of the judges of the Circuit Court, that a majority of the votes, in any district of either of the said counties, * * * had been cast against the sale of spirituous or fermented liquors, that thou it should not be hwful for say person or persons, or body corporate, to sell spirituous or fermented liquors, in any district of either of said counties voting by a majority sgainst selling the same. Section 3 prescribed the penalty for a iolation of the act; and section 4 provided that the act should take effect immediately after it should have been determined by a majority of the people in any one or more election districts of the counties named, whether or not spirituous or fermented liquors abould not be sold, as before provided for: Ilcld, that this act was constitutional and valid; its going into effect and becoming operative, being made to depend upon the result of a popular vote, was not a delegation of legislative power to the people: Fell v. The State, 42 Md.

The legislature has the undoubted power to prohibit the sale of spirituous or formented liquors is any part of the state, notwithstanding a perty to be affected by the law may have procured a license, under the general license laws of the state, which has not yet expired. Such a license is in no sense a contract made by the state with the party holding the license. It is a more permit, subject to be medified or annulled at the pleasure of the legislature, who have the power to change or re-

peal the law under which the license was granted: Id.

CONTEMPT. See Wilness.

CONTRACT.

Action—Mutual Mistaks—Rescission.—Government bonds were deposited in a bank; the depositor alleged that the bank bought them from him at par, fraudulently informing him that there was no premium on them, when there was, within the knowledge of the bank. The depositor sund the bank for the premium and declared in the common money counts: Hold, that the depositor could not recover on these counts: Sankey's Executors v. First Nat. Bank of Miffindary, 78 Pa.

If the bonds were purchased by the bank in good faith at par, although they were then solling in the market at a premium, of which both parties were ignorant, the depositor could not, on the ground of mutual mistake, recover the bonds or the premium on them: Id.

The mistake or ignorance of the perties as to the premium was not of the essence of the contract, and did not avoid the sale: Id.

Recision—Contogious Disease.—D. lessed to M. for one year all the stable had on the farm on which D. then recided. D., on his part, was to furnish everything and board M. for the year at his house. M., on his part, was to perform all the labor in raising the crops on said lead. D. was then to have two-thirds of each crop raised on said land and M. one-third thereof. At the time said lease was entered into, and exher-

quently thereto, M. was "infected with a leathsome, contagious and infectious discuss, to wit, syphilis," which discuss afterwards, and at the time M. bearded at the house of D., endangered the lives and health of D. and his family, &c.; of which discuss D. was at the time he entered into said lease ignorant. In ten days after the lease was entered into, and when D. became aware of said discuss, he refused to board M. any longer at his house. M. then left the premises and sued D. for damages, claiming (at least on the trial) as damages the value of the use of said land for one year and the value of his beard for one year. D., as a defence to said action, offered to show (both by his pleadings and evidence) that M. was affected with said discuss; that he, D., was ignorant of the same at the time he entered into said lease; and that he refused to beard M. at his house because of said discuss, but the court excluded said defence: Held, that this was error: Douglas v. McFiedin, 15 Kans.

DAMAGES. See Action.

DEED.

Construction—Perol Evidence to explain a Written Instrument.—On appeal from a decree reforming a deed on the ground of mistake, the true construction of the deed is before the court, as well as the sufficiency of the proof of the mistake: Fryer v. Patrick, 43 Md.

M. and wife mortgaged to I'. a lot and buildings, &c., "ned also all the household and kitchen furniture in the dwelling on said lot, subject however to the claim of F. thereupon for the unpaid purchase-money for the portion of said furniture now being delivered." The construction of this clause being in question upon the contention of F. that all the furniture in the house was subject to this claim, it was held, that the extent of F.'s claim could not be definitely ascertained from this clause, and extrinsic evidence might be admitted to show what it was: Id.

EVIDENCE. See Agent; Deed.

Power of Legislature over Rules of.—While a legislature may not, by the mere machinery of rules of evidence, everride and set at naught the restrictions of the constitution, or arbitrarily make conclusive evidence of a fact anything which in the nature of things has no connection with that fact nor resonably tends to prove it, yet it may make that which, according to the ordinary rules of experience, resonably tends to move a fact, conclusive evidence of it: State v. Woodford, 15 Kans.

EQUITY. Bos Highway; Municipal Corporations.

Trusts—Unexecuted Contracts.—A court of equity will execute a trust where there is a valuable consideration; but if it he veloptary the legal estate must be put out of the settler; the question as to its validity being whether it was at first perfectly created: Carhari's Appeal, 78 Pa.

In general, a court of equity will not enforce unexecuted reluntary contracts inter visce, but will leave parties to their remedies at lew: At

The simple arowal by a purchaser at shoris's sale, whether made at the time of the purchase or afterward, that the purchase was for another, will not support the allegation of a trust: Ad.

Power signed a paper stating that if he purchased lands about to be

sold by the sheriff, he would hold them on specified trusts for creditors of the defendant in the execution; after his purchase of the land, Held, under the circumstances of the case, not to create a trust in Power: Id.

Decreeing Cancellation and Delivering of Instruments.—A chancellor will not always order an instrument to be delivered up to be cancelled when he would refuse specific performance of the contract; he will leave the parties to their legal remedies: Stewart's Appeal, 78 Pa.

To decree an instrument to be delivered up to be cancelled is a matter in the sound discretion of the court, and the power should not

be exercised except in a very clear case : Id.

Whenever an instrument exists, which may be vexatiously or injuricusty used against a party, after the evidence to impeach it has been lest, or which may throw a cloud over the title, and he cannot immedistely pretect his right by any proceedings at hw, equity will afford relief by directing the instrument to be delivered up to be cancelled, or such other decree as justice or the rights of the party may require: Id.

EXECUTION. See Trespass.

FORMER ADJUDICATION. See Action.

FRAUD. See Limitations, Statute of.

Account—Bill of Review—Settlement between Guardian and Ward.
—Where an account is asked on the ground of fraud, it is not sufficient to charge fraud in general terms; particular acts of fraud should be stated: Marr's Appeal, 78 Pa.

Frand without damage is no ground for relief at law or in equity:

IJ.

Fraud used in obtaining a decree, being the principal point in issue, must be established by proof before the propriety of the decree can be investigated: Id.

A bill of review is never sustained on strict law against equity: Id.

A guardian may within a reasonable time be called to file and settle
his account, although he may have made a settlement with the ward on

his arrival at age : Id.

After a ward has arrived at full age, he may waive his legal rights to an account and join his guardian in asking for his discharge; and the

court has power to grant it: Id.

Where there was a settlement with the ward, and a rejease to the guardian after she came of age, and on the joint application of the ward and her guardian a decree made discharging the guardian, the decree could not be vacated without proof of some specific act of fraud in obtaining it, or of some injury occasioned by it: Id.

Action cannot arise from Contract schere Plaintiff depends on France.—Fisher sold a house to Saylor, agreeing to make good any less of Saylor fa a resale. Saylor sold for less than he gave. In an action against Floher for the difference there was evidence that the sale of Saylor was collusive and fraudulent. In answer to a point the court charged, if these was any collusion between Saylor and his vendes in the sale, then Saylor " cannot recover more than the difference between a fair price for the house and the amount paid to Flaher:" Hold to be error; the

Saylor, 78 Pa. was " Aplor from maintaining the action: Richer v.

Although there were no fraud in the original contract, the fourdation of Saylor's right of action, yet, as the sale by him was a condition precedent, he was bound to sail in good faith, and if the sale was collusive, it was fraudulent as to Fisher; it was as if there had been no sale, and there was no right of action: Id.

If the sale had been honestly made, although for less than the market value, Saylor could recover the difference between a fair value and the

price paid Fisher: Id.

A right of action cannot arise out of a fraudulent contract, nor out of the fraudulent performance of a condition of the contract : Ad.

FRAUDS, STATUTS OF.

Parol Promise—Debt of Agent.—Where K. & W., by a parol agreement with a certain bank, promise that if the bank a lift cash a certain draft to be drawn by and in the name of a certain agent of theirs upon B. L. & Co., that said K. & W will be responsible for its payment, and afterwards such agent does draw such draft and the said bank eaches the same, and afterwards said draft is dishonored by said B. L. & Co.: Iteld, that the bank may maintain an action to recover from said K. & W., on said parol promise, the amount paid out on said draft, with interest: Kohn and Weil v. First National Bank of Fort Scott, 15, Kans.

GUARDIAN. See Fraud.

HIGHWAY.

Encroachment on—Injunction—Equity Practice.—The Act of April 28th 1870, fixing and widening the line of Chestaut street, provided that it should "not interfere with any buildings now erected on the neutly side of that street;" the front of a building was taken down and a new freet erected on the line prescribed by the act; eranmental columns of states are, to the front were extended lifteen inches beyond the line: End; that these were not prohibited by the act: City of Philadelphia's Appeal, 78 Pa.

According to the ordinary course of equity practice, when a case is heard on bill and answer, the allegations of fact in the answer was admitted: Id.

In a bill for injunction, if the question is doubtful, it is doubtful against the injunction; chancery will not decree an injunction except in a clear case of the invasion of a public or private right: id.

No usage, however long continued, will justify an engrossisting apon a highway; but such encroachment, to be remedied by injunction, much be really an obstruction to the free use of the highway! Id.

HUSSAND AND WIFE

Validity of Agreements between—Standard of Proof in such contemporates of Proof—Invalid Gift from Husband to Wife.—Where articles of household furniture were purchased by a husband in pursuance of an autocodent agreement with his wife, that he should advance the money, and she would reimburse him, which she afterwards distributed that I are that agreements of this kind between bushoul and Milk.

when the latter has a separate crinte, are valid and binding upon both parties; and if bond file, and consummated, the property purchased by such agency becomes the goods of the wife. 2d. That no higher standard of proof of such agreements is required thus in other civil cases; a preponderance of evidence being all that is necessary. 3d. That is an action by the wife to recover damages for the illegal science and sale of said articles of furniture, under an execution against her husband, the burden of proof was on her to show that they were her separate preperty when so seized and sold: Myers et al. v. King. 42 Md.

A gift from a husband, who is insolvent, to his wife, is in prejudice of the rights of his subsisting creditors, and the wife can acquire no

valid title to the same: Id.

INTANT. See Missomer.

JUSTICE OF THE PRACE. See Trespose.

LIMITATIONS, STATUTE OF.

Actions on ground of Franci—What is included under—Plending.—Best. 18 of the code, which provides, among other things, that "an action for relief on the ground of fraud," can only be brought within two years after the cause of action shall have accrued, and that "the cause of action in each case shall not be deemed to have accrued until the discovery of the fraud," applies to actions for damages founded upon fraud, as well as to actions for equitable relief founded upon fraud: Young v. Whittenhall, 15 Kans.

Where the petition in such a case shows upon its face that the fraud upon which the cause of action is founded was consummated more than two years before the commencement of the setion, the plaintiff must further set forth in his petition that he did not discover the fraud until within less than two years before the commencement of the action, or

his petition will be held defective on demurrer : Id.

LICENSE. See Constitutional Law.

LOCAL OPTION. See Constitutional Law.

MALICIOUS PROSECUTION.

Special Damages—Must be declared for —The declaration in an action for malicious arrest was general; under it only such general damages as the law presumes would follow from the arrest could be recovered: Stanfield et al. v. Phillips, 78 Pa.

To recover special damages the declaration should set out with per-

ticularity the causes which produced them: Id.

Evidence of special damages can be given only where they have been

properly averred in the declaration: Id.

In an action for malicious arrest, under the Act of July 12th 1843, of the plaintiff, who was a merchant, the court allowed a witness to be asked, "in what manner the plaintiff was injured in credit and circumstances and to what extent:" Held to be error: Id.

Exemplary or Profites Damages—Went of Probable Cause.—In an action for malicious presecution, the plaintiff is entitled to recover, if it amount that the defendant funtituted, or expect to be justituted, the

pronocution under which the former was arrested, maliciously and without probable cause, and that said prosecution was terminated by the discharge of the plaintiff before the institution of his action: Mc Williams v. Iloban, 42 Nd.

If, in an action for malicious prosecution, the jury find for the plaintiff, they are at liberty to take into consideration all the circumstances of the case, and to award such damages as will not only compensate the plaintiff for the wrong and indignity he has sustained in consequence of the defendant's wrongful act, but may also award exemplary or punitive damages as a punishment to the defendant for such act: M

In an action for malicious proscrution, the court may properly instruct the jury, that if they find that there were no circumstances connected with the transaction out of which the proscrution arose, which would warrant a reasonable, disposionate man in believing the plaintiff to have been guilty of the charge made against him, and in undertaking such proscrution from public motives, then there was no probable cause for the prescrution, and the jury may infer, in the absence of sufficient proof to satisfy them to the contrary, that such prescrution was malicious in law: M.

MASTER AND SERVANT.

Linbility of Master for injury to Servant—Duty of Master to furnish proper Machinery, de.—It is the duty of every employer to exercise reasonable care in providing his laborers with safe machinery, suitable tools and appliances, adapted to the uses for which they are designed: Mullan v. Philadelphia and Southern Mull Steamship Co., 78 Pa.

Where a master places the entire charge of his business, or a distinct branch of it, in the hands of an agent, exercising no discretion and no oversight, the neglect by the agent of ordinary care in supplying and maintaining suitable instrumentalities, is a breach of duty for which the master is liable: Al.

The risk which a laborer assumes of injury from the neglect of his fellow, is when they are co-operating in the same business, so that he knows that the employment is one of the incidents of their common service: Id.

The plaintiff was engaged as a laborer, under a stevedore employed by the ship-owner, in unleading a vessel; the rope by which the lead was raised was one that had been spliced by the mate before the arrival of the vessel at port, and was used as a "single fail," which was more liable to part than a "double fail." Whilst raising a eask, the rope perted at the splice, the eask fell and injured the plaintiff. Whether the stevedore was a fellow-workman of the plaintiff, and whether the negligeness of the mate in splicing the rope was a rick assumed by the plaintiff, were, under the circumstances, for the jury: Id.

It was proper for plaintiff to ask of a witness if, at or immediately after the accident, he heard the stevedore say anything ecocorning the rope or its insufficiency: Id.

MISRONES.

Party served by torong Name, though an Infant, bound by.—Where the real party in interest and the one intended to be sued in actually made with recess in the same even though mades a made as a same has

most take advantage of the missioner by plant in an attent in two and and if he does not be will be concluded by the judgment or decree readered, the same as if he were described by his true name. And this rale applies as well to infent an adult defendants: Fond v. Ennis, 69-

MUNICIPAL CORPORATION.

The and control of Birects—Eminent Domain—Interference of Court of Equity —The corporate authorities of a city hold the public streats in tract for the use of the public. Where the municipality possesses the fee in such streats, although in tract for public mass, it may maintain ejectment against any one who wrongfully intrudes upon, or complex, or detains the property. Where the adjoining proprietor retains the fee, the right to the possession, use and control of the street by the municipality is regarded as a legal and not a more equitable right: Oily of Chicago v. Wright, 69 III.

Equity has no power to enjoin the exercise of the police powers given by hw to the effects of a municipal corporation, so no to prevent such effects from preserving the public peace, and from keeping a public street open to public use. The court has no jurisdiction to interfere with the public duties of any of the departments of the government, or

everride the policy of the state: Id.

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Where a court of equity, by decree, stayed the hands of the terperate attherities of a city and the police power, to eachie a party to take firethle personies of a public street, and provided that effer he had sheed up the same the city should be forever enjoined from specing or attempting to open the same, for public use, it was held to be an unwarrantable attempt to interfere with the exercise of the right of eminent dumain, on the part of the city, which was a political question of expediency, and use a judicial one! M.

Magangrace. See Moster and Screent.

Englishes to comparative.—The rule adhered to by this court is, that deglishes in the plaintiff which may have contributed to the injury will not prevent a recovery, when it is slight as sompared with the negligence of the defendant. An instruction that the jury may find the the plaintiff, unless his negligeness was equal to or greater than that of defendant, is not the law, and therefore erroneous: Mineis Control Reference Co. v. Buston, 60 III

OFFICER. See Frances.

PARTHUMSTP.

Linking of Pirus for Tort of one Portner.—The role is, that partners are linkle in solide for the torts of one, if the tort is committed by him to a partner, and in the course of the partnership business: Leavie v. Serber, 40 12.

There is Profits, when part of Compensation, door not creats.—The flut that a party salling goods, &c., is to receive a parties of the not make an onion, door not make him a partner with the owner, if they are nearely as a part of his componenties: Burton v. Goodsparel, 60

Species from in Action for Account—Duties of Postners to each other.—In an action brought by one partner against his co-partner for an accounting in which the surver, while admitting the partnership, decise the terms as alleged in the patition, and, as a annual defined, chims desired for certain broughs by the plaintiff of the partnership expirate, it is not error for the cent to submit to one jury the question of the turns and duration of the partnership, then to rathe to a solves to state and report the account between the partners, and family to submit to a count jury the chims for demagns: Chelle v. Busquit, 15 Kons.

A polition in an action by one partner symbol another, which alleges the partnership, given a copy of the written content the other, alleges that the philatiff at the outset paid in a certain specified amount, that the partnership was terminated, and that during its existence philatiff had paid on account of dobts and exposent a large sum, and that upon a satisfement of the partnership assessme, which the plaintiff had vainly sought, a large sum would be found due the philatiff, and which abtend that the partnership errord a large number of chattels and breaked a series of transmetions, states a counce of action and must be half good as against any objection that can be raised by domester, notwithsteading it does not in terms allege that defendant had passession of page of the partnership property, or that he had any accounts to reader the

The obligation of one partner to another in the management of the partnership business is the exercise of good faith and of ordinary may and produces, and if less happens through the ordinary negligates of a partner, he must bear the lun: Id.

REMOVAL OF CAUCUS.

Along of Proceeding during pendency of Matties for-Ooth and much by party.—Where an application of the plaintiff is produced in a district eners of the state, to remove the action into the United States (South Court, and the hearing of the application is not by the court for a particular day in the future, it is error for the court to allow the defination, before that day arrives, and in the absence of the plaintiff and his atterneys, and without any notice to them, to take judgment unders the plaintiff, although, upon the plandings, the defendant is entitled to just each a judgment as he obtained. But where said application is define tire, and ought to be overraied, and is eventually overraied, and where the plaintiff, who is in defends for want of a rapity, afterweek mayou the sourt to vesses and judgment, but does not also to file a rapity and where the judgment is correct types the pleadings in the absence of a rapity and the event everrales the motion to vesses the judgment is now securiously, and the overt everrales the motion to vesses the judgment is now securiously, and therefore the judgment will not be disturbed: Couper t Courtes of the 16 Kans.

Where we application, under the Act of Congress of May \$4 1887 (United States at Large \$50), is under by the photostif, to collising on totals from a district search of the oten to the United States Should Court, and the photostif bismoif does not "make and the "may alkhools, not is these may reason given why he does not do so, but his atthrough and makes and the atthrough and makes and the set the atthrough to seather out?

states therein that the attorney and agent, and not the plaintiff, "has reason to and does believe" that the plaintiff cannot obtain justice in such state court, &c.: Held, that the application is not founded upon a sufficient affidavit. The plaintiff himself should make the affidavit: Id.

SALE.

Warranty—Rescission—Fraud—Evidence—Return of the Goods,— The defendant sold plaintiff a horse, warranting it sound, the eyes being then sore: evidence of the condition of the eyes a year afterwards was admissible for the purpose of showing that the disease was not temporary, but permanent: Freyman v. Kurcht, 78 Pa.

Evidence of the condition of the eyes a year after the sale was not admissible per as to show that they were discussed at the time of the sale; it should not have been received without evidence to show what

was their condition during the intermediate time: Id.

The plaintiff, alleging that the warranty had been broken, returned the horse, the defendant refused to receive it, and it was sold as a stray for about the price plaintiff paid: Ifold, that evidence of these facts was admissible: Id.

The horse or its value was the property of the plaintiff, and the defendent might show the price for which it was sold as a stray, as evidence

of the value at the sale to the plaintiff: Id.

If the defendant was guilty of fraud in the sale and warranty of the horse, the plaintiff skight rescind, and, on returning or offering to return it, recover back the price paid in case for deceit, or in assumptit or case for the fraudulent warranty: Id.

If there were no fraud the plaintiff could not rescind the contract for breach of warrants and return the horse without defendant's concent:

14.

He might one either in case or assumptit for breach of warranty, and the measure of damages would be, not the consideration, but the difference between the actual value and the value, if sound, with interest from the sale: Id.

Where there is a warranty and no froud or agreement to return, the vendes cannot rescind the contract after it has been excented; his only remody is on the warranty: Id.

SET-OFF.

Unliquidated Damages.—In this state any cause of action arreing from contract, whether it be for a liquidated domand or for unliquidated damages, may constitute a set-off, and be pleaded as such in any action founded upon contract, whether such action be for a liquidated demand or for unliquidated damages: Stevens v. Able, 15 Kaus.

STATUTE.

Use of Word in same sense in Different Statutes.—Whomever a legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislation on the same subject-matter, it will be understood as using it in the same source, unless there he something in the context or the unture of things to indicate that it intended a different meaning thereby: State v Woodford, 15 Kaus.

TITLE.

Personal Property.—Davis deposited a piane for storage with Kirby, who bought and sold second-hand furniture at auction and received goods on storage; Kirby had the piane sold at an auction store; Quinn bought it bond side at a sair sale, without knowing who was its owner: Mold, that Davis sould recover the piane from Quinn: Quinn v. Davis, 78 Pa.

The owner of a chattel cannot, apart from legal process, be directed of his title to it, except through some unlawful or improvident act of his own. The transfer of possession to another without more is not such act: Id.

The transfer must be accompanied by something indicating in the entending a right of property or power of alleuation; there must be proof of language or conduct at least equivocal! Id.

TRESPASS.

Officer—Execution from Justice of the Poace.—An execution which recites a judgment only against B, and is issued upon a judgment only against B, is no protection to an officer in levying upon the property of A., although it commands him to seize the property of A.: The Wilton Then Company v. Humphrey, 15 Kans.

If a claim such on before a justice of the peace is a claim against a corporation, service made upon and defence made by the corporation, and judgment in fact rendered against the corporation, such proceedings will not be vitiated by a more mis-resitation of the name of the corporation: Isl.

Great allowance must be made in the proceedings of justices of the peace for their ignorance of legal phrascology and their want of familiarity with the requirements of judicial proceedings, and if from the record can be gathered what the magistrate intended to do and decide, and there is that which, however irregularly and inertificially prepared, can be construed into an expression of that intention, the record will be uphold as a sufficient record of the intended set and decision: Id.

TRUSTS. See Equity.

WITHES.

Competency—Agent—Death of Agent—Determination of Competency.—Where a firm through an agent enters into a contract, the person with whom the contract is made, on his suit against the firm for a breach of the contract, is a competent witness, although the agent be deed: Act of 1868, ch. 116; Spencer v. Trafford, 42 Md.

A firm through its agent L. S. entered into a contract with T., who such for a breach of the contract. At the trial T., the plaintiff, testified that L. S. was dead. Thereupon the defendant offered to prove by H. S., one of the defendants, that L. S. was a member of the firm and beneficially interested in the contract, for the purpose of impenshing T.'s competency as a witness: Act of 1868, ch. 116. The plaintiff objected on the ground that H. S. was not a competent witness: Mill, that H. S. was a competent witness to prove that L. S. was a member of the firm: M.

In civil cases, where the question of the competency of a witness is one of that, the court can refer the question to the jury: M.

Rule falsus in uno, dr.—Province of Jury as to Credibility.—The court below instructed the jury as follows: "If you should be satisfied that any witness in this case has wilfully and corruptly testified faisely, to any material fact, then it is your duty to disregard the whole of the testimony of such witness:" Held, that such instruction is erroneous, although supported by the decision made in the case of the State v. Campbell, 3 Kans. 488, and other cases following that case; also Held, that it is the province of the jury to determine the credibility of witnesses and the weight of their testimony; that where any witness has testified wilfully, corruptly and falsely, to any material fact, it is the province of the jury to determine how much, or whether the whole of the testimony should be disregarded, and that no inflexible rule of law thought be interposed between the witness and the jury commanding the jury to take all or to exclude all of his testimony: Shellenbaryer v. Nature, 15 Kans.

Control of Court over Presence of—Exclusion of Testimony for Missenduct—Rights of Party—Contempt.—Where the court makes an order excluding from the court room during the trial all witnesses except such witness as may at any time be called in for examination, it is the duty of all witnesses to obey such order, and any person violating the order may be pusished therefor. But where a witness does violate the order, it is error for the court to exclude his testimony simply because of such violation, over the objections and exceptions of an innocent party to the case who desires to examine the witness: Darenport v. Ogg, 15 Kans.

The testimony of the witness should be received in such a case and should go to the jury, but the conduct of the witness may also be shown

to the jury for the purpose of affecting his credibility: Id.

Where there is nothing in the record tending to show that the party desiring to examine the witness participated in the guilt of the witness, it will be presumed by the Supreme Court that such party was innocest: M.

Where the testimony of a witness is excluded because it is supposed that the witness is incompetent, it will be presumed, in the absence of enything to the contrary, by the Supreme Court, if the witness is found to be competent, that the party offering him was prejudiced by the exclusion, although the testimony of the witness may not be set out in the spaned. The rule seems to be this: Where the court below excludes evidence because the evidence and not the witness is supposed to be inimportant, the record must contain the evidence nought to be introduced, so that the appellate court may see whether it is competent or not; but where the court below excludes the witness because the witness and not his evidence is supposed to be incompetent, then all that is necessary to put in the record is enough to show whether the witness is competent or not; M.

And where the competency of a witness is objected to for any particular reason it will be presumed by the Supreme Court, unless the contrary appears, that no other ground for his exclusion exists; and home all that is necessary in such a case for the record to contain is unough to show whether the particular reason given for the exclusion is sufficient or not: Id.

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STUDIES IN THE LAW OF THE STATUTE OF FRAUDS.

VII. Partnership Realty in its relation to the Statute of Freude.

UPON the question when and how far partnership realty is to be regarded as personalty, see Sugilon on Venders, 8th Am. ed., Perkins's notes 498-0, cum notic / 1 Amor. Load. Cases, 5th ed., 508 (484); 1 Tudor's Leading Cases in Mercantile and Marieine Luv. Ist Am ed., 585; Fox's Digest of Partnership Law, tit. "Real Metate;" Collyer on Partnership, Perkins's ed., \$5 188-157, and notes. For a series of propositions on this point, see Bird v. Marrison, 19 Wis. 188; also Bissett on Partner. (Am. ed. 1847) *66 As to the bearing of the Statute of Frends, see Story on Partnerstip, 5th ed., § 80, and note. In Agate v. Gignous, 1 Robert, 272 it was decided that a lease ewned by a partnership, though in aqui might be personalty for partnership purposes, must be transfer writing under the Statute of Frauds. In Die was said that equity does not transmitte land ! ship into personalty, but only treats it as on noting the rights of the parties between the contract concurning it to be within

Thorn, 11 Iowa 147; Gray v. Palmer, 9 Cal. 689; Healey v. Brown, 1 Stew. 144; Claney v. Craine, 2 Dev. Eq. 863. In Pitte v. Waugh, 4 Mass. 426, the law-merchant as to partnership was said not to extend to speculation in land, and that by the Statute of Frauds no man is chargeable on any contract concerning the sale of land, but on some memorandum in writing, &c. In Ballard v. Bend, 32 Vt. 358, explaining and distinguishing Hedges v. Green, 28 Vt. 360, the plaintiff and defendant had agreed, by parol, that the former should convey to the latter certain land, and that if within a year the plaintiff could find a better purchaser, the defendant should convey to such purchaser the land and should share the profit with the plaintiff; the plaintiff conveyed to the defendant, and found a better purchaser within the year; the defendant refused to convey to the latter, and the Statute of Frauds was held a good defence.

In Kidd v. Carson, 88 Mid. 87, the plaintiff conveyed land to the defendant, who by parol agreed to sell and credit the profit to a subsisting indebtedness of the plaintiff's to him; the Statute of Frauds held to apply. In Henderson v. Hudson, 1 Munf. 510, the plaintiff claimed to be a partner in a purchase of land made by the defendant, but only proved parol acknowledgments subsequent to the alleged agreement of parknership; the Statute of Frauds was held to apply.

Partnership contracts in land are within the Statute of Frauds, and must be evidenced by writing: Bird v. Morrison, 12 Wis. 152, where the point is fully treated; Benton v. Roberts, 4 La. Ann. 216; Gant v. Gant, 6 Id. 678; Pocot Co. v. Armelin Bros., 21 Id. 667; Rossiand v. Booser, 10 Ala. 694. In Linscott v. McIntire, 15 Me. 208, one who had an interest in land procured it to be conveyed to another, who verbally promised to sell and may over the proceeds of sale: Held, that the Statute of France was no bar to an action for such proceeds. See Leslie v. Rosson, 89 Miss. 368; Runnell v. Tainter, 4 Coan. 568; Tresbridge v. Wetherbee, 11 Allen 861. In Bruce v. Hestinge, 41 Vt. 880, an agreement was to sell a farm and divide the profits, and the Statute of Frauds was held no bar to an action for a share of the profits. Neither the plaintiff nor the defendant took the title in their own names, but had the deed made directly from the eriginal ewners to the vendoes. In Watkins v. Gilberson, 10 Tex. 840, citing 5 Id. 512, a contract to procure land-certificates and netents in consideration of next of the land, held not to be within

the Statute of Frauds. See Miller v. Rederts, 18 Tex. 19. In Price v. Sturgis, 44 Cal. 594, a promise by one who has received a conveyance of land to pay so much out of the first proceeds of sale is not within the Statute of Frauds, "being not for the conveyance of land, but for the payment of a certain sum of money upon the happening of a certain event." Besides the references given at the beginning of this paper, see, on the general subject of partnership realty, Bispham on Equity, §§ 511–18; Foctor's Appeal (Supreme Court of Ponnsylvania), 18 Amer. Law Rog. N. 8. 300, and note.

VIII. How far Contracts relating to the Produce of Land are within the Statute of Frauds.

"The sale of emblements," says Mr. Leake (Elements of the Law of Contracts 138-4), " or the annual growing crops sown by the tenant of land (see Co. Litt. 55 a, b; Williams Bx., 5th ed., 1860), is not considered as a contract concerning an interest in the land for the purpose of the statute: 1 Wms. Saund. 277 & n. (f). An agreement for the sale of a growing crop of potatoes is not a contract for an interest in land within the 4th sect. of the statute: Evans v. Roberts, & B. & C. 820; Sainebury v. Mattheme, 4 M. & W. 348; so, a sale of growing crops of corn: Jones v. Flint, 10 A. & E. 753; but these contracts are within the 17th sect. of the statute, as being sales of goods : Evene v. Roberts; and see Smith v. Surman, 9 B. & C. 561. It has been held that a contract for the sale of growing crops of hope was not morely a sale of goods, but gave an interest in the land within the 4th sect. : Waddington v. Bristow, 2 B. & O. 461; also, that a sale of a growing crop of turnips was within the 4th acot.: Emmerson v. Heelis. 2 Taunt. 88; but these cases it is said would now probably be decided differently. See Evane v. Roberts; Rodwell v. Phillipe, 9 M. & W. 501, 508; Jones v. Flink. A contract for the sale of a grewing crop of grace, being a natural and permanent crop and not coming within the description of emblements, is a contract for an interest in land within the statute and must be in writing: Crooly v. Wadoworth, 6 East 602; Evene v. Roberts; Sholton v. Livius, 2 C. & J. 411; Carrington v. Rosts, 2 M. & W. 248. So, a contract for the sale of a growing crop of trees or underwood: Sevell v. Bezall, 1 Y. & J. 896; Teel v. Auty, 2 B. & B. 99. A contract for the sale of crops of fruit growing on fruit trace, was hold to be a contract for the sale of an interest in

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land within the Stamp Act: Nedwell v. Phillips. Where a contract Is made for the tenancy or possession of land, together with the growing crops left upon the land and the benefit of work, labor and materials previously expended in tilling the land, though the crops "and tiliages may be agreed to be paid for ut a separate valuation, they are considered as forming part of the land, and the contract must be in writing: Earl Felmouth v. Thomas, 1 C. & M. 89; and see Mayfield v. Wadsley, & B. & C. 857. A contract for the sale of the produce of land to be taken as goods does not give any interest in the land, though it is not severed from the land at the time of the contract; as a contract for the sale of potatoes then being in the ground at so much per sack or so much per acre: Perker v. Standand, 11 East 862; Warnick v. Bruce, 2 M. & A contract for the sale of timber at so much per foot, being the produce of certain trees then growing when they should be cut down, was held not to be a contract for the sale of the growing trees, and, therefore, not to give any interest in the land: Smith v. Surman. A contract for the right to feed cattle on cortain land was held to be a contract for the agistment of cattle and not to give an interest in the land: Jones v. Flint."

Fructus industriales, while growing, were held to be personal chattels in Brittein v. McKey, 1 Ired. 205, discussing Croeby v. Wade. worth and Evans v. Roberts. In Whipple v. Toot, 2 John. 418, st was held that wheat or corn growing was a chattel and might be taken in execution as such. Newcomb v. Rayner, reported in a note to Whipple v. Toot, was as follows: A. raised a crop on B.'s ground and sold it verbally to U., who brought trespass de bonit cop. against B., who had cut and carried it away: held he could recover. In Restch v. Long, 27 Md. 97, a contract to deliver at a future period corn at the time of the promise ungathered, held not to be within the Statute of Frauds, labor being part of the contract : Eichelberger v. McCauley, 5 H. & J., cited. In Bricker v. Hughen, 4 Ind. 146, "growing crops raised annually by labor," were said to be "the subject of sale as personal property even before their maturity," and that their cale did " not necessarily involve an interest in realty requiring a written agreement." Sherry v. Picher, 10 Ind. 876, following Bricker v. Hughes, holds growing crops raised annually by labor to be personalty. Bee Gent v Gent, 6 La. Ann-678. In Rece v. Welbi, 11 Gray 285, a contract for cale at a certain price of growing cabbages not yet ready to be gathered, but which

afterwards, when ready for gathering, are escated to the parties with an agreement that the purchaser may take them away at any time, makes a sufficient sale and delivery of the whole number. not with standing the Statute of France. In Bull v. Gravett, N III: 886, growing wheat was hold to be personal property and the sobject of a parel tale. From the cylinder of Propell v. Mach, 42 lili 406, we extract the following: "As between healthful and tale ant, debtor and greditor and (under the statute of littlede) executed tor and help growing erope are personalty; but us t wrongloor and the ewner of the sell, and between resplayand pu sharer, they are real estate and pass by a conveyance, unless reservation is made in the writing. Until metured they connect be sold by the ewner of the soll, unless the transfer to a by a memorandum in writing." In Marchell v. Porguesa, 20 Cal. B, it is hold that the sale of growing frustus deductriales demand i not within the Statute of France, and that on this point the Bi and American authorities agreed: Green v. Armetrong and di v. Bryan elted. In Frank v. Marrington, 26 Bark. 416, it was hold that hope growing and matering on the vine are chattels Avene v. Moderic was said to lay down the destrone that metuality was not important, but that the test was whether or not labor ion expense had been bestewed. Bishep v. Bishep, 1 Kerni M shed, and the Buglish cases considered

myor, 9 Cowen 80, Creeky v. Wad In Awards to de Perfer v. Standand, were regarded as inconsistent, and a se for the sale of a growing crop hold not to be within the St Frauds: it was also said that the ewaer of the erop unight t tronpass of it. In for an injury to the In Dador in Jordan, 8 Ohlo 486, it was hold that graving born might be reserved by arel from the operation of a dood in the comnd inherically the contract to this effect did not contract. pl. In Milhedre v. Mrivel, 80 Ma. w66, however, a doed was expented for land with growing wheat even on it ; a verbal better the mide, and a sale of it (the every tree to the greater of the head. The Statute of In Bryant v. Greeks, 40 Ms. 21, the d to apply dered and every ready to be ent-were hold not to be within the Statute of French. The New York were enactioned to go the eather length of treating gree ols almosts. In Juras R. Polatan S Cal

that growing trees may be conveyed by deed, and are not chattels so as to require a delivery to perfect the assignment.

In Penhallon v. Desight, 7 Mass. 84, corn ripe and fit to be out bold subject to execution as a chattel. See, however, as to the point of maturity, Craddock v. Riddlesberger, 2 Dana 206. In Bosman v. Cann, 8 Ind. 58, a parol agreement to sell and deliver at sixty deliars per ten whatever broom corn should be raised in 1868 on a certain twenty-five acres, held to be a sale of goods, and for that reason within the Statute of France: Watte v. Friend cited. In Pitkin v. Neges, 48 N. H. 294, an agreement to raise three acres of potatoes and deliver them to the other party at so much per bushel, held to be a contract for chattels. See, upon the question of annual crops being personalty. Standards v. Festes, 2 Rawle 161; Myere v. White, 1 Id. 856, and the Bank of Pennsylvania v. Wise, 8 Watta 406.

In Cutler v. Pope, 1 Shop. 879, it was held that a contract for the sale of grass aiready grown and in a condition to be out was not within the Statute of Francis: Crooby v. Wedoworth criticised; Parker v. Staniland approved. In The Bank v. Gary, 1 Borb. 544, growing trees, fruits and grass, being parcel of the land, were held to be within the Statute of Francis, and that they could not be sold or conveyed by parol. The distinction was made between yearly crops and those growing spentaneously and permanently, it being admitted that grass, c. g., might be severed by a writing, and then, though still unout, it would be a chattel. Benk v. Gary was the cuse of an execution issued on growing gram as a chattel, with the paral consent of the defondant in the exeoution: beki not good. Crosby v. Wadsworth, Evans v. Roberts, Jones v. Mint, and Teel v. Auty, were considered. See, however, Craddock v. Riddlesberger, 2 Dana 208. Huff v McCauley, 58 Penna. St. 210, esting Crooky v. Wadoworth, and Yeakle v. Jacobe, 38 Penna. St. 876, holds sales of growing timber, not made with a view to immediate severance, within the Statute of Frauds. A contract for the sale of growing trees is within the statute: Mirself v. Burnett, 4 Jones Law Rep. In Claffin v. Carpenter, 4 Mote. 582 (see also Seevell v. Bessell), it was held that a contract for the sale of standing wood or timber, to be out and severed from the freshold by the rendee, does not ecurey may interest in the had. A contract for wood to be out and paid for at so much per cord is not within the Statute of Frank: Killmore v. Howlett,

48 N. Y. 569. In Smith v. Bryan, 5 Md. 141, A. sold B. trees grewing on the land of the former at a specific price; B. out and removed some and resold the remainder to A.: Held to be a sale of goods, and that as to the portion resold delivery was perfected, citing 1 Greenl. on Evid., § 271. In Warren v. Loland, 2 Barb. \$18, it was said that growing trees, except where there is a special ownership in the trees apart from the land, belong to the realty, and a contract concerning them is within the Statute of Frauda. In Byasse v. Reese, 4 Metc. (Ky.) 872, a sale of growing trees in contemplation of their immediate separation, held not to be within the Statute of Frauds, citing 1 Greenl. on Evid., § 271. In this case no time for the removal of the trees was fixed, but the vendee marked a certain number and had begun cutting them. In Stephens v. Santes, 51 Barb. 545, A. agreed to cut ties from his own land and deliver them to B. at so much per tie; B. furnished the money as the work progressed, and the timber was to be his as soon as cut. The ties were cut and hauled to the land of a third person, and there verbally turned over to B. as his property: Held, that they could not be levied on as A.'s property, and that the Statute of Frauds did not apply to such a contract. The rule was declared to be that where work upon the subject-matter of the sale is to be done for the vendee, the case is taken out of the statute. In Nettleton v. Sikes, 8 Metc. 85, an agreement by an owner of land that another may cut down trees on the land, peel them, and take the bark to his own use, held not to be within the Statute of Fraude. In Hawell v. Miller, 85 Miss. 700, the sale of growing trees with the right to enter and cut is within the Statute of Frauds. In Kingelry v. Holbrook, 45 N. II. 318, the law in Massachusetts and Maine, citing 1 Greenl. on Evid., § 271, said to be that sales of growing trees are not within the statute, unless it is shown that they (the trees) were left on the land to derive benefit from it, or unless the vender was to have a beneficial interest in the land. The court, however, held the presumption to be the other way, and that the trees were realty, if the vendee had the right at a feture time, whether definite or indefinite, to enter and take them. In Buck v. Pickwell, 27 Vt. 158, an agreement to soil all the timber on cortain land to be taken off at the vendee's pleasure, held to be within the Statute of France: Smith v. Surman, and Sole v. Seeley, distinguished, and a number of cases considered. Growing trees not negroup once are not a subject of execution: Bruces 221. In The second second

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Fitch v. Burr, 38 Vt. 688, approving Buck v. Pickwell, st was said that a contract for the future growth of trees and the beneficial use of the land for that purpose for a series of years, or during the pleasure of the vendee, may perhaps be distinguished from an ordinary purchase of stumpage by the foot or cord in contemplation of an early removal or delivery as chattels. In Ellison v. Brigham, * 86 Vt. 66, a contract by the defendant to cut down timber on cortain land and deliver it to the plaintiff, who was to pay for it at so much per cord, was bold to be within the Statute of Francis, and the court, citing Smith v. Surman, considered the agreement as one for the delivery of chattels and not for work and labor done. In the arguments of counsel a great many cases will be found cited. See Whitmarch v. Walker, 1 Metc. 818. In Erchine v. Plummer, 7 Greeni. 451, semble, that a sale of growing trees to be out and carried away is not within the Statute of Frauds; but otherwise, as to such a sale, with an indefinite time to the purchaser to take away the timber: the law of Connecticut said to hold even the " bricks, &c., of a house to be severed to be personalty. In White v. Foster, 102 Mass. 875, a grant of a present estate in trees while growing, held to be within the Statute of Frauds; but otherwise is i so to a more right, either definite or unlimited, as to the time to enter and cut with a title to the property when it becomes a chattel. In Pattison's Appeal, 61 Penna. 296, a sale of growing timber to the be taken of at discretion, held to be within the Statute of Frauda. In Chine v. McGuire, 18 B. Mon. 340, a sale of growing timber . with a view to immediate severance, held not to be within the statate: Greenl. Ev., § 271, approved. In Green v. Armstrong, 1 Denie 552, a contract for twenty-two growing trees, to be paid for at la. 6d. per saw-log, to be out and carried away may time within twenty years, was held to be within the Statute of Francis. In Bennett v. Seett, 18 Barb. 847, A. and B. agreed that the . Somer should out wood on the land of the latter and should have till the next winter to entry it away: the Statute of France hold to apply. An existing right in a third person to out and remove trees is an ensumbrance on hand so at to give ties to a breach of a + coverant to convey free of encombrance land with regard to which such a right exists: Sparr v. Andrew, 6 Allen 420.

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RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

RICHARD L. WALLACH ET AL. C. JOHN VAN RISWICK.

Under the Act of Congress of July 17th 1862, for the confection of enemy's property, a seisure and sale of land in which the owner, a participant in the solution, had an equity of redemption, passed his whole title and left no estate in him which he could subsequently convey.

Nor does the joint resolution of Congress of the same date, limiting the furfactors to the effector's life, change the offset of the act. What is forfaced is not a technical life-estate, but the entire estate during a limited period.

The property of W. was mortgaged by him to R., and subsequently was conficuted and sold by the United States in 1968, under the Act of July 17th 1968, R. becoming the purchaser. In 1964, W. and wife made a deed of the property in fee simple to R., with covenants of general warranty. In 1972, W. having died, his heirs filed a bill against R., to redress as against the mortgage, and to have the deed of W. in 1866 declared void: II.Id., that the bill would lie.

APPEAL from the Supreme Court of the District of Columbia.

The complainants were children and heirs-at-law of Charles S. Wallach, who was an officer in the Confederate army during the late rebellion. While thus in the Confederate service, his real estate, situate in the city of Washington, was seized by order of the President, under the Confiscation Act of July 17th 1862, and a libel for its condemnation was duly filed. The lot of ground, respecting which the present controversy arose, was condemned to forfeited to the United States on the 29th day of July 1868, and on the 9th day of September next following, it was sold under a writ of venditioni expones, the defendant, Van Riswick, becoming the purchaser. Prior to the seizure, the lot had been conveyed by Charles S. Wallach in trust to secure the payment of a promissory note for five thousand dollars which he had berrowed, and at the time of the seizure a portion of this debt remained unpaid and due to the defendant, to whom the note and the security of the deed of trust had been assigned. Wallach's interest in the property was, therefore, an equity of redemption, and by the con-Secation sale the purchaser acquired that interest, and held it with the security of the deed of trust given to pretect the payment of the promiseory note. On the 8d of February 1866, Wallach having returned to Washington, made a deed perporting to seavey the lot in fee simple with covenants of general warranty to Van

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Riswick, the purchaser at the confircation sale. His wife joined with him in the deed.

So the case stood until February 3d 1872, when Wallach tied. The complainants then filed this bill, claiming that after the seizure, condemnation and sale of the land, as the property of a public enemy engaged in the war of the rebellion, nothing remained in him that could be the subject of sale or conveyance; consequently that nothing passed by the deed from Wallach and wife, and that they, being his heirs, had, upon his death, an estate in the land and a right to redeem, and to have the conveyance of their father to Van Riswick declared to be no bar to their redemption. The relief sought was redemption of the deed of trust, discovery (particularly of the amount remaining due upon Charles S. Wallach's note), an account of the rents and profits of the land since the death of Wallach, a decree that his deed of February 3d 1866 is of no effect as against the plaintiffs, a decree for delivery of possession of the lot, and general relief.

To this bill the defendant, Van Riswick, demurred generally, and the court below sustained the demurrer and dismissed the bill. Hence this appeal.

The opinion of the court was delivered by

STRONG, J.—The formal objections to the bill deserve but a passing notice. It is not, we think, multifarious, and all persons are made parties to it who can be concluded or affected by any decree that may be made; all persons who have an interest in the subject-matter of the controversy. The main question raised by the demurrer, and that which has been principally argued, is whether, after an adjudicated forfeiture and sale of an enemy's land under the Confiscation Act of Congress of July 17th 1862, and the joint resolution of even date therewith, there is left in him any interest which he can convey by deed.

The Act of July 17th 1862 is an act for the confecation of enemies' property. Its purpose, as well as its justification, was to strengthen the government and to enfecble the public enemy by taking from the adherents of that enemy the power to use their property in aid of the hostile cause: Miller v. United States, 11 Wallace 268. With such a purpose, it is incredible that Congress, while providing for the confiscation of an enemy's land, intended to leave in that enemy a vested interest therein, which he might

sell, and with the proceeds of which he might aid in carrying on the war against the government. The statute indicates no such intention. The contrary is plainly manifested. The fifth section enacted, that it should be the duty of the President of the United States to cause the seizure of "all the estate and property, money, stocks, credits and effects" of the persons thereinafter described (of whom Charles 8. Wallach was one), and to apply the same and the proceeds thereof to the support of the army of the United States: and it declared that all sales, transfers and conveyances of any such property should be null and void. The description of property thus made liable to seizure is as broad as possible. It covers the estate of the owner, all his estate or ownership. No authority is given to seize less than the whole. The seventh section of the act enacted, that to secure the condemnation and sale of any such property (vis., the property swised), so that it might be made available for the purpose aforesaid, proceedings should be instituted in a court of the United States, and if said property should be found to have belonged to a person engaged in the rebellion, or who had given aid or comfort therete, that the same should be condemned as enemics' property, and become the property of the United States, and might be disposed of as the court should decree, the proceeds thereof to be paid into the treasury of the United States for the purpose aforesaid. Nothing can be plainer than that condemnation and sale of the identical property seized was intended by Congress, and it was expressly declared that the seizure ordered should be of all the estate and property of the persons designated in the act. If, therefore, the question before us were to be unswered in view of the proper construction of the Act of July 17th 1802 alone, there could be no doubt that the seizure, condemnation and sale of Charles S. Wallach's estate in the lot in controversy, left in him no estate or interest of any description which he could convey by deed, and no power which he could exercise in favor of another. understand to be substantially conceded on behalf of the defeedant.

But the Act of 1862 is not to be construed exclusively by itself. Contemporaneously with its approval a joint resolution was passed by Congress and approved, explanatory of some of its provisions, and declaring that "no proceedings under said act should be so

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construed as to work a forfeiture of the real estate of the offender beyond his natural life."

The act and the joint resolution are, doubtless, to be construed as one act, precisely as if the latter had been introduced into the former as a proviso. The reasons that induced the passage of the resolution are well known. It was doubted by some, even in high places, whether Congress had power to enact that any forfiture of the land of a rebel should extend or operate beyond his life. The doubt was founded on the provision of the Constitution, in sect. 8d, art. 8d, that "no attainder of treason shall work corfuption of blood or forfeiture, except during the life of the person attainted." It was not doubted that Congress might provide for forfeitures effective during the life of an offender. The doubt related to the possible duration of a forfeiture, not to the thing forfeited or to the extent and efficiency of the forfeiture while it continued. It was to meet the doubt which did exist that the resolution was adopted. What, then, is its effect, and what was intended by it? Plainly, it should be so construed as to leave it in accord with the general and leading purpose of the act of which it is substantially a part, for its object was not to defeat, but to qualify. That purpose, as we have said, was to take away from an adherent of a public enemy his property, and thus deprive him of the means by which he could aid that enemy. But that purpose was thwarted, partially at least, by the resolution, if it meant to leave a portion, and often much the larger portion, of the estate still vested in the enemy's adherent. If, notwithstanding an adjudicated forfeiture of his land and a sale thereof, he was still seized of an estate expectant on the determination of a life-estate, which he could sell and convey, his power to aid the public enemy thereby remained. It cannot be said that such was the intention of Congress. The residue, if there was any, was equally subject to seizure, condemnation and sale with the particular estate that preceded it. And it is to be observed that the joint resolution made no attempt to divide the estate confiscated into one for life and another in fee. It did not say the forfeiure shall be of a life-cetate only, or of the possession and enjoyment of the property for life. Its language is, " no proceedings shall work a forfeiture beyond the He of the offender"—not beyond the life-cotate of the offender. The obvious meaning is that the proceedings for condemnation and sale shall not affect the ownership of the property after the termination of the offender's natural life. After his death the land shall pass or be owned as if it had not been forfeited. There is nothing that warrants the belief it was intended that while the forfeiture lasts it should not be complete, vis., a devolution upon the United States of the offender's entire right. The words of the resolution are not exactly those of the constitutional ordinance. but both have the same meaning and both seek to limit the extent of forfeitures. In adopting the resolution Congress munifestly had the constitutional ordinance in view, and there is no reason why one should receive a construction different from that given to the other. What was intended by the constitutional previous is free from doubt. In England attainders of treason worked corruption of blood and perpetual forfeiture of the cetate of the person attainted, to the disherison of his heirs or of those who would otherwise be his heirs. Thus innocent children were made to suffer because of the offence of their ancestor. When the Federal Constitution was framed this was felt to be a great hardship, and even rank injustice. For this reason it was ordained that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted. No one ever doubted it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers. Its purpose has never been thought to be a benefit to the traitor, by leaving in him a vested interest in the subject of forfeiture.

There have been some Acts of Parliament providing for limited forfeitures, closely resembling those described in the Act of Congress as modified by the joint resolution. The statute of 5th Elizabeth, ch. 11, "against the clipping, washing, rounding and filing of coins," declared these offences to be treason, and emacted that the offender or offenders should suffer death and less and forfeit all his or their goods and chattels, and also "less and forfeit all his and their lands and tenements during his or their natural life or lives only." The statute of 18th Elizabeth, ch. 1, enacted the same provision "against diminishing and impairing of the Queen's Majesty's coin and other coins current within the realm," and declared that the offender or affenders should "less and forfeit to the Queen's Highness, her heirs and successors, all their leads, tenements and hereditaments during his or their natural life or lives only." Each of these statutes provided that no attain-

der under it should work corruption of blood or deprive the wife of an offender of her dower. The statute of 7 Anne, ch. 21, is They all provide for a limited forfeiture—limited in duration, not in quantity. And certainly no case has been found, none, we think, has ever existed, in which it has been held that either statute intended to leave in the offender an ulterior estate in fee after a forfeited life-estate, or any interest whatever subject to his dispensing power. Indeed, forfeiture has frequently been spoken of in the English courts as equivalent to conveyance. It was in Lord Lovel's Case, Plowden 488, where it was said by HARPER, Justice, "the act (of attainder) is no more than an instrument of conveyance, when by it the possessions of one man are transferred over to another." And again: "The act conveys it (the land forfeited) to the king, removes the estate out of Lovel and vests it entirely in the king." In Burgese v. Wheats, 1 Eden 201, in discussing the subject of forfeiture, the Master of the Rolls said, "the forfeiture operated like a grant to the king. The crown, said he, takes an estate by forfeiture, subject to the engagements and encumbrances of the person forfeiting. The erown holds in this case as a royal trustee (for a forfeiture itself is sometimes called a royal escheat). * * * If a forfeiture is regranted by the king the grantee is a tenant in capite, and all mesne tenure is extinct." See also Brown v. Waite, 2 Mod. 188. If a forfeiture is equivalent to a grant or conveyance to the goverament, how can anything remain in the person whose estate has been forfeited which he can convey to another? No conceivable reason exists why the construction applied to the English statutes referred to should not be applied to our Act of 1862 and the joint resolution. If in the British statutes the sole object of the limitation of the duration of forfeiture was a benefit to the heirs of the offender, it is the same in our statutes, and it is a perversion of the intent and meaning of the joint resolution to read it as preserving rights and interests in those who under the act had forfeited all their estate. What was seized, condemned as forfeited, and sold in the proceedings against Charles S. Wallack's cetate, was not, therefore, technically a life-estate. It is true that in Bigelow v. Porrect, 9 Wall. 889, and Day v. Mison, 18 Id. 156, some expressions were used indicating an opinion that what was sold under the confication acts was a life-estate curved out of a fee. The language was, perhaps, inscationally used. We certainly did not

intend to hold that there was anything left in the person whose setate had been confiscated. The question was not before us. We were not called upon to decide anything respecting the quantity of the cetate carved out, and what we said upon the subject had reference solely to its duration.

It is argued on behalf of the defendant that, because under a confiscation sale of land, or of estate therein, the purchaser takes an interest terminable with the life of the person whose property has been confiscated, the fee must be somewhere, for it is said a fee can never be in abeyance, and as the fee cannot be in the United States, they having sold all that was seized, nor in the purchaser, whose interest ceases with the life, it must remain in the person whose estate has been seized. The argument is more plausible than sound. It is a maxim of the common law that a fee cannot be in abeyance. It rests upon reasons that now have no existence, and it is not now of universal application. But if it were, being a common-law maxim, it must yield to statutory provisions inconsistent with it, and it is, therefore, of ne weight in the inquiry what was intended by the Confiscation Act and concurrent resolution. Undoubtedly there are some anomalies growing out of the Congressional legislation, as there were growing out of the statutes of 5th and 18th Elizabeth, but it is the duty of the court to carry into effect what Congress intended, though it must be by denying the applicability of some common-law maxime, the reasons of which have long since disappeared. It has not been found necessary in England to hold that a reversion remained in a traiter after his attaint, though the statutes declared that the ferfeiture shall be during his natural life only.

We are not, therefore, called upon to determine where the fee dwells during the continuance of the interest of a purchaser at a confiscation sale, whether in the United States or in the purchaser, subject to be defeated by the death of the effender whose estate has been confiscated. That it connect dwell in the effender, we have seen is evident, for if it does the plain purpose of the Confication Act is defeated, and the estate conficuated is subject alike in the hands of the United States and of the purchaser to a parameter right remaining in the effender. If he is a tenant of the reversion, or of a remainder, he may control the use of the particular estate at least so far as to prevent waste. That Congress intended such a possibility is incredible.

If it be contended that the heirs of Charles S. Wallach cannot take by descent unless their father, at his death, was seized of an estate of inheritance, e. g., reversion, or a remainder, it may be answered that even at common law it was not always necessary the ancestor should be seized to enable the heir to take by descent. Shelley's Case is, that where the ancestor might have taken and been seized, the heirs shall inherit. (FORTESCUE, J., Thornby v. Fleetwood, 1 Strange S18.)

And if it were true that at common law the heirs could not take in any case, where their ancestor was not seized at his death, the present case must be determined by the statute. Charles S. Wallack was seized of the entire fee of the land before its confiscation, and the Act of Congress interposed to take from him that seisin for a limited time. That it was competent to do, attaching the limitation for the benefit of the heirs. It wrought no corruption of blood. In Lord De La Warre's Case, 11 Coke 1, a, it was resolved by the justices "that there was a difference betwixt diesbility personal and temporary, and a disability absolute and perpotual; as where one is attainted of treason or felony, that is an absolute and perpetual disability, by corruption of blood, for any of his posterity to claim any inheritance in fee simple, either as heir to him or to any ancestor above him; but when one is disabled by Parliament (without any attainder) to claim the dignity for his life, it is personal disability for his life only, and his heir after his death may claim as heir to him or to any ancester above him." There is close analogy between that case and the present. See also Wheatley v. Thomas, Levins 74.

Without pursuing this discussion further, we repeat that to held that any estate or interest remained in Charles S. Wallach after the confiscation and sale of the land in controversy, would defeat the avowed purpose of the Confiscation Act, and the only justification for its enactment; and to hold that the joint resolution was not intended for the benefit of his heirs exclusively, to enable them to take the inheritance after his death, would give preference to the guilty over the innocent. We cannot as held. In our judgment, such a helding would be an entire perversion of the meaning of Congress.

It has been argued that the proclamation of amnesty after the close of the war restored to Charles B. Wallach his rights of property. The argument requires but a word in answer. Conced-

ing that amnesty did restore what the United States held when the proclamation was issued, it could not restore what the United States had ceased to hold. It could not give back the property which had been sold, or any interest in it, either in possession or expectancy: Semmes v. United States, in this court not yet reported. Besides, the proclamation of amnesty was not made until Docember 25th 1868.

The decree of the Supreme Court of the District dismissing the complainant's bill is, therefore, reversed, and the cause is remitted for further proceedings in conformity with this opinion.

The above decision is one of very considerable importance, as well from the principles involved as from the effect it may have upon other estates similarly situated. And after repeated readings. with every disposition to view it in the most favorable light, we cannot say that either the construction of the court or the reasoning of the learned judge appear onsirely ratisfactory. It is an admitted departure from the natural and obvious impert of the longuage of the statute, when viewed, as the court enucede it must be, in connection with the joint resolution of the same date. The learned judge feels compelled to apologise for the language of the court in other cases, where the same statute was involved, but not upon the very point here determined. We comprehend very well that each incidental language of the court, where the very point here determined was not before them, is not by any means to be treated as a conclusive adjudication of the present question. But the general language, which good lawyers, and especially good judges, adopt in defining the scope and purport of a statute then under consideration, is supply to be regarded as conclusive of the natural and primary import of the terms of the statute. There will be no difference of opinion upon this point among good lawyers. What then is the ground upon which the court here attempts to justify the adoption of a lery and unnetweel exectracion

merely that "it is incredible that Cougrees, while providing for the conferetion of an enemy's land, intended to leave to that enemy a vested interest thereis," which he might still apply to the perpose of carrying on the war. If the case were to be determined upon the probable general "intent" of Congress in passing the statute, we should not discent from almost any view the court might adopt, however extreme. But the word "intent," when thed with reference to a statute or the Mislature passing it, means the intent expressed in the language therein used, In its netural and ordinary sease, will strued with reference to the matter. And when the egger guage of this exactment is that H not work a forfeiture beyond th the offredor." we think it fair that it means just what it says, " feiture." of the estate of the es beyond his life or of his lifetime. we give it any more extended in than that of a mero life estate, we it a forced and unnatural construct. and we do this in the case of a star highly penal, where the party again whom it operates is entitled to dome the solution of all doubts in his form We, in effect, make the forfature of th life estate embrece the reversion withou ony adequate words. And we also us counter many other anomalies, as the court freekly admit. We show the the

of the language of this statute? Why.

of the estate literally nowhere, which is a result not to be found in any modern case to our knowledge; and we further allow the heirs to inherit an estate which did not exist in that ancestor. These are anomalies which we have no doubt Congress had power to provide for. and perhaps would have provided for. if these contingencies had been suggosted, but it could not have been done short of the use of very express language. And for the court to now add these proviologs to the statute, by more construction, without any adequate language, and in violation of the natural import of the terms in which it is expressed, and in order to render a penal statute more pound, is sufficiently at variance with the settled course of statutery construction to excite surprise in all minds, when we consider the high character of the court from which it comes.

There may be some escape from this apparent anomalous character of the decision, but we have sought in vain for It, in the opinion of the learned Judge. All that is there said about the construction of the English courts of forfoltures under their statutes for punishing crimes. neems to us wholly irrelevant. This is not in any sense a forfeiture for crime. It is not strictly a forfeiture at all. That would imply a previous trial and conviction, of which there is no pretence here. This is merely a proceeding against the estate of Wallach in the land, not because of any alleged oriene, except that of being an enemy in time of war, which may depend upon his residence, and ordinarily does. But . however that may be, here it is certainly no oriens, and if it were, would work no forfeiture until after conviction. This schure of enemies' property, within the territories of the bulliggrouts, is no new thing. It is well understood and clearly defined by all writers upon international law. The only difference between this and ordinary cases of the character is, that commonly nations are content to capture or confinents the unifract of enomics' real estate during the war: Bynk. L. 1, c. 7; Vattel, L. iii., c. 8, § 76; Twiss on Law of Nations 118, § 61. But here the statute graspe the whole life estate of the enemy, and the court extend it virtually over the fee and the reversion by mere construction.

It seems to us that the unsatisfactory nature of the opinion in this case is the natural and necessary result of the impossible task set the learned judge by the court of justifying an erroneous decision. If the decision were the other way there would be no embarrasument in finding good reasons for it. It would, In fact, require no argument to support it, since it would be but following the natural import of the very terms of the statute. How then, it may fairly be asked, can the court know that Congress intended to deprive Wailack of every possible estate in this land, when no such thing is said, but the contrary ? And how can it be fairly inferred, from anything in this statute, that Congress feit any special interest on behalf of the heirs, more than of Wallack himseif? The natural presumption would be that the helrs were as likely to be enemies to the government as the ancostor. The truth probably is that Congrees made up, in their own imagingtion, rome fencial analogy between the confication of enemies' property, and the forfeiture of estate consequent upon conviction for treason, as defined in the constitution, and attached the joint recelution as a condition to the statute. Just the whole neight fall from attempting too much. All this was, no det founded in mistake. But it explains why the statute did not attempt day seizure of enemies' estate beyond the limit of their own lives. And this would not naturally embrace the fee, or the right to convey it, with the reversion or remainder. There was no attainder or corruption of Mood. There was not

even the declaration that enemies should be regarded as aliens, they depriving them of the right to transmit their real estate in any of the ordinary modes by deed, or device, or descent. They stead In all respects as they did before the science or confiscation, with full power to transmit their estates in the premises by all the modes named. And there some to us no just ground to argue that Wallach had not all the estate he ever had in this land, except his lifeestate. This, we see very clearly, he had lost, and nother the termination of the war nor the amnesty would restore it to him, because neither could unds the facts upon which the confiscotton proceeded.

We trust we have made the grounds

of our discont from the decision clear, and that we have done so in such moderand courteous terms as are not ineconistant with our nuqualified respect for the court, and the learned judge in particular who gave the epinion. And while we feel that our views may possibly be founded in error, not being able to feel the same confidence in our conelections as we tnight upon some subjects with which we had been more familiar, we must, nevertheless, lacist that in every view we are able to take of the matter the decicion is at vertance with all the well established easens of statutory construction known to the law, so the as involved in the case.

LP. B.

Court of Appeals of Maryland. ROBATIO L. WILLTRIDGE s. BOSALIE C. BARRY.

On a bill of interpleader filed in a Maryland court, to cettle the conflicting claims of two parties under a policy of incurance made payable in Philadelphia, growing out of an assignment of the policy made in the city of New York, both parties having appeared to the suit, the case must be disposed of according to the law of Maryland.

A policy of incurance taken on the life of a knoband for the sole use of his wife, and payable to her or her assigns, is a clear in action of the wife's, which the has the right to assign or otherwise dispuse of with her husband's consent.

The wife holding such policy, attached her signature to a block printed form not attached to the policy, without name of assignee or date, and with no directions from her as to filling up the blanks or as to the delivery of the paper or policy. Whether such a paper signed and delivered in blank with an express or implied authority from the party signing it to fill up the blank to the person to whom it is delivered, as he thought proper, and who afterwards filled it up accordingly, it a valid assignment sufficient to pass the title to the above is action, Quere f

The advance to B. by A. of certain premierory notes, to a large amount, which he had finally to pay, upon the faith of B.'s securing him by the assignment of policies of incurance and other property, countitates a sufficient consideration to support B.'s assignment to A. of such policies.

The eignature of a fone covert to the assignment of a policy of insurance effected for her sole use, made with the concent of her husband, is sufficient without his signature.

The 24 sect. of art. 46 of the Code, providing for the conveyance of the wile's property by a joint deed with her hashaud, and the 11th sect. where the hashaud is required to join in the conveyance, were intended to apply to each conveyance.

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of her property as were required by law to be made by all persons, by dead or other instrument of writing, as the case might be. They do not exclude the ordinary method of conveyance.

But whatever the nature of the transfer, from regard to the interests of husband and wife, it must be made with the concurrence of the husband, express or implied.

A policy of insurance was taken on the life of a husband for the sole use of his wife, and payable to her or her assigns. The wife, influenced by the importunity of her husband, and under circumstances amounting to a controlling duress, and which deprived her of that necessary freedom in the exercise of her mental faculties to make the act binding upon her, attached her signature to a blank printed form not attached to the policy, without name of assignee or date, or designation of the policy, and with no direction from her as to filling the blanks or delivery of the assignment or policy. B. having advanced to the husband certain promissery notes to a large amount, which he had finally to pay, upon the faith of the hasband's securing him by the assignment of policies of insurance and other proparty, the husband caused the assignment to be filled up with a transfer of the policy oferesaid to B., and delivered this assignment and subsequently also the policy itself to B. Upon the death of the husband, in a contest between the wifeand the assignee of B. (for the benefit of creditors), as to which was entitled to recover on the policy, it was held, I. That B.'s assignee could claim no greater right than B. held in the policy; 2. That the wife was entitled to recover, as the importunity under which she signed the instrument of assignment was such as to deprive her of her free agency, or such as she was too weak to resist, and she count not to be held responsible therefor.

APPEAL from the Circuit Court of Baltimore City.

This was a bill of interpleader, filed by the National Life Insurance Company of the United States of America, chartered by Act of Congress, to have determined the respective rights of Rosalie C. Barry and Horatio L. Whitridge, trustee of William H. Brune, to the proceeds of a policy of insurance effected on the life of John S. Barry, husband of said Rosalie. The policy was made at Washington, D. C., August 28th 1868, for \$5000, in favor of Rosalie C. Barry, to her sole use, if living, and to her executors, administrators and assigns, if dead; with a provision authorizing its assignment by way of security or absolutely, and made payable at Philadelphia.

About the beginning of August 1871, Rosalie C. Barry assigned this policy for a valuable consideration to William H. Brune; who received said assignment from John S. Barry, August 8d 1871, and subsequently, on the 18th of February 1872, made a general assignment of all his estate and effects, including the policy of insurance, to Horatio L. Whitridge, for the benefit of his creditors.

The assignment to Brune grew out of the following facts:
At several times prior to the assignment, Brune, trading under

the name of F. W. Brune & Sons, at the solicitation of said Barer. for his accommodation, and upon the pledge that the notes should be beld sacred and cortainly paid, and the loan secured by an acsignment of policies of insurance on the life of said Barry, and of other property, loaned to Barry the promissory notes of F. W. Brune & Sons, to the amount of about \$80,000, all of which notes Brune had ultimately to pay, which so seriously embarraced him as to compel his failure, and the deed in trust to Whitridge. After the maturity and non-payment by Barry and the payment by Brune of a portion of the notes so loaned, Barry, in partial fulfilment of his promise to secure him, sent to Brune in August 1871, an assignment, executed by Rosalio C. Barry, in favor of Brune, with power of attorney annexed, of certain policies of insurance on her husband's life, in her favor, among which was the policy in queetion in this suit, and Brune thereafter renewed certain of the matured notes which he afterwards paid. The policies covered by the assignment were subsequently also handed to Brune.

This assignment was executed by Rosalie C. Barry, in blank, and filled up with the transfer of the policies aforesaid, by the direction of John S. Barry, to whom she had given it so signed by herself.

John S. Barry died in the city of New York on the 9th of March 1872, and the insurance company having refused payment under said policy to Whitridge, because of the claim and suit therefor of said Rosalie, instituted at Philadelphia, Whitridge brought suit against the company in the Superior Court of Bultimore City, which was afterwards discontinued.

Other facts in the case are stated in the opinion of this court.

The appeal is taken from the decree of the Circuit Court, awarding the amount of the policy to Bosslie C. Barry.

J. Morrison Harris and Fred. W. Brune, for the appellant.— This is to be construed as a Maryland contract; and a Maryland court, adjudicating the administration of a fund under its own jurisdiction, is bound to maintain and enforce an assignment valid under Maryland law, even if such assignment might be held invalid under the laws of New York, where said Resalis C. Barry was living at the time of its execution: Wilson v. Careen, 12 Md. 75; Shuith v. McAtes, 27 Id. 488, 489; Story's Coull. of Laws, 128. This assignment of a chose in action created and settled to the sole and separate use of Mrs. Barry, voluntarily signed by her in blank, handed to her husband, by his direction filled up, with a transfer among other things of the policy in question, was transferred to and held by Brune, under circumstances that made him a holder for value, and vested in him a legal and sufficient title to the proceeds of the policy.

It is not necessary to constitute a bond fide holding that the value should have been paid at the time of receiving the security—a part consideration is sufficient: Sawyer v. Prickett et ux., 19 Wallace 166; Swift v. Tyeon, 16 Peters 1; Goodman v. Simonde, 20 Howard 848.

Brune being in possession bond fide of the assignment, and a holder for value, cannot be affected in his rights by the assumed misrepresentations by which the husband is said to have precured it from his wife; because he was not cognisant of the means used and in no way aided or abotted them: Corbett v. Breek, 20 Beav. 524; Van Duser v. House, 21 N. Y. 535; Hall v. Hinks, 21 Md. 416, 417; Powell v. Bradles, 9 G. & J. 220.

She handed the assignment to her husband in blank, which gave him the right to fill it up; and her act held him out as the owner of, or as having power of disposition over, the property, and parties innocent of the fraud, dealing with him for value, are pretected against her claim: Van Duzer v. House, 21 N. Y. 586; N. Y. & N. H. Railroad Co. v. Schuyler, 34 Id. 50; McNeil v. Tenth National Bank, 46 Id. 829; White v. Verment & Mass. Railroad, 21 Howard 576; McHenry v. Davie, Law Rep. 10 Eq. Cases 88. See also Carr. v. Le Ferre, 27 Penna. 418; Mechanica' Bank v. N. Y. Railroad, 4 Duce 480, 580, 582; Carpenter v. Longen, 16 Wallace 278.

The appelloe is estopped from disavoving the legitimate consequence of her set, in thus allowing her husband to hold himself out as the owner of, or having full power of disposition over, the presently, because Drune was misled by it to his projudice; this constitutes an estoppel in pair: Fromen v. Buckingham, 18 Howard 183; Funk v. November, 10 Md. 301; for admissions acted on by others, whether true or false, are conclusive against the party making them in all cases between him and the party where conduct he has thus influenced: McCleffan et us. v. Kennedy, 8

Md. 230. See also McClotton v. Konnedy, S Md. Ch. Dec. 247; Hall v. Hinks, 21 Id. 416, 417.

John P. Pos and I. Novett Steels, for the appelles.

The opinion of the court was delivered by

STEWART, J.—The National Life Incurence Company fiel a bill of interpleader in the Circuit Court of Baltimore City, bringing the fund in dispute within that jurisdiction for determination.

The respective claimants of the proceeds of the policy in question, under the decree of interpleader, have appeared, and the case must be disposed of according to the law of this state.

It seems to be conceded, on all sides, that the less fort must govern in the determination of the case.

The policy in question was taken on the life of John S. Barry, for the sole use of his wife, Mrs. Barry, the appellee, to whom it was made payable, or to her assigns.

There can be no doubt, it was a chose in action of hers, which she had the right to assign, or otherwise dispose of, with her husband's concent: N. Y. Life Inc. Co. v. Flack, 8 Md. 841; Emerick v. Coakley, 85 Md. 185.

The alleged assignment was not endersed on the policy; Mrs. Barry's signature was attached to a blank printed form of assignment, without name or date, and with no direction from her as to the filing up of the blanks with the name of any person, or with one or more, or all of her policies; or to deliver the paper, or policy, signed by her, to any person. Whether such a paper, signed and delivered in blank, with an express or implied authority, from the party signing it, to fill up the blank, to the person to whom it is delivered, as he thought proper, and who afterwards filled it up accordingly, is a valid assignment and sufficient to pass the title to the choos in action, it is not necessary, from the view we take of this case, to decide. The authorities are confloting, and it is a debatable question. See Kent v. Somerville, 7 G. & J. 268; Cheeley v. Taylor, 8 Gill 267; Shriner v. Lamborn, 12 Md. 174; Spiber v. Nydogger, 30 Id. 815; Byere v. McClonchan, 6 G. & J. 250; White v. Verment and Mass. Rallread Co., 21 Howard 575; McHoll v. Touth National Bank, 46 H. Y. 330; Litch v. Wolfe, 46 14. 687; Edgarton v. Thomas, 5 Seiden 40; Deuron v. Coles, 16 Johnson 54; Drury v. Fester,

Ewale 24; Hibblewhitt v. McMorine, 6 Mees. & Wels. 200. Brune having advanced to Barry certain promissory notes, to a large amount, which he had finally to pay, upon the faith of Barry's securing him by the assignment of policies of insurance and other property—constituted a sufficient consideration to support Mr. Barry's assignment to Brune of the policy in question: Hannan v. Towers, S. II. & J. 147; Stevenson v. Reigart, 1 Gill 27.

We treat the matter as it affected Brune; his assignee, Whitridge, can claim no greater right than Brune held in the policy.

The signature of Mrs. Barry to the assignment of the policy (if the assignment was otherwise valid), made with the consent of her husband, would be sufficient without his signature thereto. Whether he signed with her or not, was not material to its validity.

Before the Code, the wife, as to her separate property, if not restricted to a prescribed mode, could convey it as if she were a feme sole: Cook v. Husbands, 11 Md. 492; Chew's Adm. v. Beall, 18 Id. 348; Buchanan v. Turner, 26 Id. 1.

The 2d sect. of 45th art. of Code provides for the conveyance of the wife's property by a joint deed with the husband; and the 11th section, where the husband is required to join in the conveyance, were intended to apply to such conveyances of her property as are otherwise required by the law to be made by all persons, by deed or other instrument of writing, as the case may be. They do not exclude the ordinary methods of conveyance.

The purpose of these provisions was to enable the wife, with the concurrence of her husband, to dispose of her property by the usual modes, and not to restrict the power of convoyance so as to require that every portion of her property, however minute, should be conveyed by herself and husband by solemn instrument of writing.

But whatever the nature of the transfer, from regard to the interest of husband and wife, it must be made with the concurrence of the husband, express or implied.

Mrs. Barry, who thus executed the alleged assignment of the policy, appears from the evidence to have been not at all deficient in mental capacity to understand what she was doing; on the contrary, endowed with more than ordinary intelligence. But, netwithstanding such was the character of her mind, the evidence, mainly from herself, shows to a sufficient extent, although not free from difficulty, that at the time she executed the assign-

ment in question, she was laboring under controlling durest, and had not that necessary freedom, in the exercise of her mental fuculties, to make the act binding upon her, to all intents and purposes.

Mrs. Barry seems to have been advised of the views and financial efforts of her husband; was made familiar with his plans and schemes, and fully impressed, by his persistent importunities, with serious apprehension as to his condition and the state of his affairs. According to her statement, admitted as evidence, she seemed to have been fearful of the consequences as to his future course, if she failed to sign the paper as he requested. Most undoubtedly she was much exercised over this matter, hesitating and undotermined as to what she should do. But after having repeatedly before refused to sign the instrument left with her for the purpose, she was induced to change her purpose.

In determining as to her moral freedom, in the execution of the act, as affecting her legal responsibility, her relation as wife to her husband must have much force; and adequate allowance should be made therefor. The circumstances surrounding her and her husband giving character to the act, must be duly considered.

From a full consideration of all the evidence, we are constrained to the conclusion that there was such a presence upon her, from the condition of her husband and apprehended consequence, she was deprived of that moral agency requisite to a binding set, in the conveyance of her policy, and that she ought not to be bold responsible therefor.

Such was the unanimous opinion of the judges of the Court of Appeals of New York, upon the same testimony, affirming the action of the inferior court, and deciding that her signature was to be considered as affixed under duress and compulsion. Much respect in due to the opinion of that learned tribunal, and without very convincing evidence to the contrary, their conclusion is not to be disregarded.

A court of equity cannot hold her bound by her act, under the circumstances. Whilst it is not every degree of importunity that is sufficient to invalidate an instrument transferring property, yet if it be such as to deprive the party executing it of her free agency, or such as she is too weak to resist, she ought not to be held responsible therefor: Davie v. Calvert, 5 G. & J. 269; Wittman et us. v.

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Goodhand, 26 Md. 96. The facts disclosed in this case must give the appelles the benefit of such defence.

From a careful consideration of the evidence, and the principles of law and equity applicable thereto, we think Mrs. Barry ought not to be estopped from claiming the fund in court, and it must be paid over to her.

Decree affirmed and cause remanded.

Circuit Court of the United States, District of Connections.
WILLIAM K. LOTIIROP at Al. v. JOHN W. STEDMAN at Al.

The right of the judiciary to declare a statute void for unconstitutionality is only to be exercised in clear cases, and this rule applies with especial force to decicious upon metions for provisional injunctions.

The principle that a stockholder of a company cannot maintain a bill in equity-against a wrongdoor to prevent un injury to the corporation, unless it shell be averred, and shell effirmatively appear, that the corporation has refused to take measures to protest itself, does not extend to a bill which is in good faith filed by a oraditor.

A holder of a policy in an insurance company is a creditor within this rule.

A charter is a contract between the state and the corporators, and the corporation takes the grant subject to the limitations contained in the act of incorporation. If no power of repeal is reserved, none can be exercised; but when a charter itself or a general statute provides that the charter is subject to repeal by the legislature, at its pleasure, without restrictions or conditions limiting the power of repeal, the legislature has the right to exercise its power summarily and at will, and its action, being a legislative and not a judicial not, cannot be reviewed by the courts, unless it should exercise its power so wantonly and carelessly as to palpably violate the principles of natural justice.

A repeal of a charter does not of itself violate or impair the obligations of any contract which the corporation has entered into. But the legislature cannot establish such rules in regard to the management and disposition of the assets of the corporation, that the avails shall be diverted from or divided unfairly and unequally among the creditors, and thus impair the obligation of contracts, or that the portion of the avails which belong to the stockholders shall be sequestered and diverted from the owners, and thus injure vested rights.

The legiclature has the right to appoint a trustoe, to take the assets and manage the affairs of a corporation, whose charter has been repealed, in conformity with the general, just raise which it has prescribed, or with the raise of a court of equity, if no statutory provisions have been enacted. If no trustee is appointed by the legiclature, a court of equity, which mover allows a trust to fail for the weat of a trustee, would see to the execution of that trust, although by the disconnicion of the corporation, the legal title to the property had been changed.

Though the statement of facts in a prescribe to a statute is not evidence as against a party whose rights are affected without his consent, yet where the legis-

lature does an act within its powers, a statement of its reasons in a preamble will not affect the validity of its act.

A statute repealing a charter at a certain date, provided that the company shall make up a deficiency in its assets before that date, then the charter shall remain in force, and appointing a special tribunal to determine whether the deficiency is made up or not, is not a delegation of legislative power and is valid. A statute may be passed to take offset on the happening of a future event.

Motion for injunction.

The bill was filed September 11th 1875, and on the same day a motion was made for a provisional injunction, pending the hearing on which an experts injunction was granted. The facts are stated in the opinion.

Wm. D. Shipman and Wm. W. MacFarland, for the complainants.

Simeon E. Baldwin, for the insurance commissioner, one of the defendants.

No councel appeared for the insurance company, which was the other defendant.

SHIPMAN, J.—The American National Life and Trust Company was incorporated by the General Assembly of the state of Connecticut in the year 1860, under the name of the American National Life Insurance Company. The eighth section of the charter is us follows: "This resolution " " may be altered, amended or repealed at the pleasure of the General Assembly."

A statute of the state passed in 1871, relating in part to life insurance companies, and creating the office of insurance commissioner, provided in substance, that if it should appear to the commissioner from any report, valuation or examination of any life insurance company, that the assets of any such company incorporated by this state, were less than its liabilities, the commissioner should, at his discretion, bring a petition to the proper court of probate, praying for the appointment of a trustee, to take possession of the property of such company for the benefit of its creditors, and, if it should appear that the assets were less in amount than three-fourths of the liabilities of such company, the act made it imperative upon the commissioner to bring such potition without delay.

On Nevember 28d 1874, Mr. John W. Stedman, then and new

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proper probate court, alleging that the result of an examination of the financial condition of the American National Life and Trust Company, and a valuation of its policies and assets, disclosed that the assets of the company were less than its liabilities, and less than three-fourths of its liabilities, and praying for the appointment of a trustee. After a full hearing, said court having called to its assistance a judge of the superior court, in pursuance of a statute of the state, found that "the allegation that such assets are less than three-fourths of the liubilities is untrue, that the allegation that the assets of said company are less than its liabilities is true, and the court further finds that the deficiency is not such that the prayer of the petition should be granted," and dismissed the petition. The insurance commissioner presented to the General Assembly, at their May session 1875, a special report upon the affairs of this company, and at the same session, the legislature passed the following joint resolution:—

Mherens the American Mutual Life Insurance Company of New Haven, has transferred its assets to the American National Life and Trust Company of New Haven, and has ceased business, said last-named company assuming the liabilities of said American Mutual Life Insurance Company; and whereas, it appears from the report of the insurance commissioner relating to the affairs of said American National Life and Trust Company, that the liabilities of said company exceed its assets more than \$400,000; and whereas, said company has neglected and refused to render to the insurance commissioner a report of its condition and affairs as required by law; therefore,

" Resolved by this Amendby, That the charter of said American Mutual Insurance Company and the charter of said American National Life and Trust Company shall, on the 1st day of September A. D. 1875, be, and become wholly and absolutely repealed and annualled; I rorided, however, that if said American National Life and Trust Company shall, before asid 1st day of September 1875, supply the deficiency existing in its essets, and receive from the insurance commissioner a certificate . showing that the amets of said company are sufficient to ratisfy all outstanding and unpaid debts and claims, and to provide a full reinsurance reserve upon its policies in force, to be ascertained as now required by hw, then the charter of said companies shall remain in full force; and shall not, by this resolution, be repealed or annuited; Provided further, If there shall be any disagreement between the insurance commissioner and said American National Life and Trust Company as to the amount of access, their value and their sufficiency, the Chief Justice of the Supreme Court of Errors shall, upon the application of either the insurance commissioner or said company, designate one of the judges of the Superior Court to sit with him, and they shall fully hear the parties

nd determine the amount of such secent, their value and sufficiency, d their determination shall be conclusive; and they shall thereupon

issue their certificate of the amount of the deficiency, if any, to be puid in; and if said company shall, within thirty days after the delivery of said certificate to the secretary of said company, pay in the deficiency therein stated; this resolution shall become inoperative and vaid. The decision of said judges shall be made, and said vertificate shall be deli-

vered to said secretary before November 1st 1875.

"And provided further, that in case of a disagreement between the said company and the insurance commissioner as to the value or sufficiency of its assets, and said company does not supply the deficiency in its assets on or before the 1st day of September 1875, the insurance commissioner shall then and thereupon, on said 1st day of September 1875, take possession of all the assets, books and papers of said company, and hold the same subject to the order of said chief judge, and to be disposed of as provided by law."

At the same session the legislature passed a statute in regard to the disposition of the assets of life insurance companies upon the repeal of their charters, providing in substance, that the title of the assets of any such corporation should vest absolutely, and in fee simple, in the insurance commissioner, who should held and dispose of the same for the use and benefit of policy helders of such company, and such other persons as may be interested in such assets, and divide the avails in a specified order, and be subject to the direction and control of the superior court for the county within which the corporation should be situate.

The American National Life and Trust Company did not, prior to September 1st 1875, supply to the satisfaction of the commissioner the alleged deficiency in its assets, and disagreed with that officer in regard to the amount, value and sufficiency thereof. He made preparations to take possession of the property of the company on September 1st 1875, and prior to the investigation by the chief justice and his associate. The company thereafter brought a petition before the Superior Court for New Haven county, to enjoin the commissioner against his proposed action: a temporary ex parte injunction was granted, which was dissolved by his honor, Judge BEARDSLEY, on motion of the insurance commissioner, and after a hearing of the parties. A temperary and ex parts injunction has also been granted by Judge Rosewoon, of the Court of Common Pleas, upon the petition of the insurance commissioner, to restrain the directors and executive effects of the company from disposing of its assets.

Sundry citizene of the state of New York who hold and own policies of insurance which have been issued by said company, on which it is liable to pay, by vistue of lawful equipments heretofere entered into, have brought their bill in equity before this court against the commissioner and said corporation, alleging its solvency, praying that the commissioner be enjoined against taking persession of said assets, and that the company be enjoined against delivering such persession, mainly and principally upon the ground that the resolution of the General Assembly which has been queted, and which is the foundation of the authority of the commissioner so to take possession, is veid and of no effect. The reasons which are arged in support of this position will be stated hereafter. The complainants have also moved for the issuing of a previsional injunction to restrain the commissioner from taking possession of the assets of the company until the final hearing of the bill, and upon this motion council for the complainants and for the commissioner have been heard at length.

The only question new to be decided in, whether a previousal

Injunction should be granted?

The general principles of law which are involved in this case are of great importance, and concern possiblery interests in this country of no ordinary magnitude, and would justify me in taking more time for the consideration of this motion then I am new able to give. It is proper that a hearing, which will soon take place before Chief Justice Park and his associate, in regard to the value of the assots of the company, abould not be embarrassed by the pendency of any undecided motions in this court, and it is due to the policy-holders in this company that they abould be speedily apprised by the decisions of courts in regard to the management of its property. These considerations demand a prompt decision, and prevent anything more than a succinct statement of the principles which I down applicable to the case.

It is obvious at the outset, that the question I am asked to determine has always been considered by courts one of grave import-

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"The right of the judiciary to declare a statute void and to arrest its execution, is one, which in the opinion of all courts, is coupled with responsibilities so grave, that it is never to be exercised except in very clear cases; one department of the government is bound to pressure that another has acted rightly. The party who wishes us to pressure a law unconstitutional takes upon himself the burden of preving beyond doubt that it is so: " Brit of M. M. Maitread Ca. v. Choop, 36 Prena. St. 367, per Black, J.

It should be a very clear case to justify a court in deciding that an act of the legislature is invalid, upon a motion for a provisional injunction, a proceeding which addresses itself particularly to judicial discretion.

The defendant corporation to a stock corporation authorized to issue life policies upon the mutual plan of insurance, but it is not strictly a mutual incurance company, and the policy-holders are not necessarily members of the corporation, and have no right to participate in its management. The complainants appear before the court only as creditors of the company. Being oursens of the state of New York, they have a right to bring this bill against the defendants, citizens of Connections, and their interest as creditors of the corporation and ecoluse que trust of the fund which is now in the central of the directors of the corporation, entitles them to maintain their suit if they have suffered injury. The principle that a stockholder of a company cannot maintain a bill in equity agulast a wrongdoor to prevent an injury to the corporation, unless it shall be averred, and shall affirmatively appear, that the corporation has refused to take measures to protest itself, deep not extend to a bill which is in good faith filed by a creditor.

It is suggested that the questions in this case are the same us these which are stated in the potition of the incurance company now pending in the Superior Court, and that they have already been virtually passed upon by the decision of Judge Bearsoner. While the decision of any judge upon a motion for a temperary injunction is not a controlling authority, yet it is true that the same general questions which are here presented, were deceased in an argument before Judge Bearsoner, and the fact that an eminent judge of this state had in effect refused the injunction when it was urged by the incurance company, about properly lead me to exercise caution before I granted it in an action which, though brought by the policy helders, the affiderite on file in this case tend to show was instituted at the instance of the company.

The council in the case are not seriously at issue as to the principles which are applicable to the repeal of the charters by laxislation.

A charter is a contract between the state and the corporators, and the corporation takes the great subject to the limitations which are contained in the not of incorporation. If no potent of

rescal is reserved, none can be exercised; but when a charter itself or a general statute provides that the charter is subject to repeal by the legislature, at its pleasure, without restrictions or conditions limiting the power of repeal, the legislature has the right to exercise its power summarily and at will, and its action, being a legislative and not a judicial act, cannot be reviewed by the courts, unless it should exercise its power so wantonly and consolessly as palpably to violate the principles of natural justice, and in such case, a repeal, like other legislative acts, which do thus palpably violate the principles of natural justice, may be reviewed by courts. The power of the legislature therefore is not unlimited, for the private rights of persons are not subject to an unjust and despotic exercise of power by a legislature without mesns of redress. "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere: the executive, the legislative and the judicial branches of there governments are all of limited and deferred power:" Loan Association v. Topeka, 20 Wall. 668. It is always to be presumed that the legislature has exercised its great powers for adequate cause, and the extreme caution with which legislatures ordinarily act upon the subject of the repeal of charters fully warrants such a presumption.

It is to be observed, that this charter, like the majority of Connecticut charters, provides that it may be repealed "at the pleasure of the General Assembly." It is unlike the charters in the Pennsylvania cases of Eric & N. E. Railroad Co. v Casey, 26 Penna. St. 287, and Commonwealth v. Pitteburgh & Connelleville Railroad Co., 58 Id. 46, which provided that, if the companies should abuse or misuse their franchises, the charter should be subjest to repeal. There is no question here whether the k-ginlature to or is not the final judge, whether the contingency upon which the anthority to repeal is based has occurred. The language of this charter is also unlike the charter which was examined in Allen v. McKeen, 1 Summ. 276, which provides that the legislature could alter, limit, restrain or annul the powers conferred, and m which case the court held that a right of absolute repeal was not received. The right of repeal is here expressly received, is to be exercised at the pleasure of the General Assembly, and is subject only to the limitation which I have suggested.

It is not material, whether the Court of Probate had or had not

decided that it was expedient to appoint a trustee. That court simply found that the company was insolvent, but that its assets were not less than three-fourths of its liabilities. The finding, or the opinion of the court, did not debur the legislature from inking such legislature action as it deemed just.

A repeal of a charter does not of itself violate or impair the obligations of any contract which the serperation has entered late. But the legislature cannot establish such rules in regard to the management and disposition of the assets of the corporation, that the avails shall be diverted from or divided unfairly and unequally among the creditors, and thus impair the obligation of contracts, or that the portion of the avails which belong to the stockholders shall be sequestered and diverted from the owners, and thus injure vested rights.

"The capital and debts of banking and other memoral corputations constitute a trust fund, and pledge for the payment of creditors and stockholders, and a court of equity will by hold of the fund and see that it be duly collected and applied. * * * * * * A law distributing the proceeds of an inselvent trading or bruking corporation among its stockholders, or giving it to strangers, or seising it to the use of the state, would as clearly impair the obligation of its contracts, as a law giving to the heirs the effects of a deceased natural person, to the exclusion of his creditors would impair the obligation of his contracts:" Chrysia v. State of Arbeness, 15 How. 812.

The legislature has also the right, as an administrative mentager, to appoint a trustee, to take the assets and manage the affairs of a corporation, whose charter has been repealed, in conformity with the general, just rules which it has prescribed, or with the rules of a court of equity, if no statutory previous have been enacted. If no trustee is appointed by the legislature, "a court of equity, which never allows a trust to fail for want of a trustee, would see to the execution of that trust, although by the disministrant of the corporation, the legal title to the property had been changed:" Current v. Arbeness, cited supre.

The complainants do not controvert, in the main, the principles which have been stated, but they contend that, while the legislature had the right to repeal this shorter, it has not been in that repealed; and, if it has been repealed, that the previolens by which

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the commissioner was appointed to hold the sasets subject to the order of the Chief Justice, who does not act as a judge, but merely as a committee, and whose directions are not subject to appeal or review, and the provision that the title to the assets shall be vested in the commissioner, are invalid, and that the resolution is void.

It is contended that:-

1. The preamble is void, because the legislature has no power to find facts which may affect private rights, and that the preamble is so interwoven with the resolution, that, being void, the resolution is void also.

It is true that the facts recited in a preamble of a private statute are not evidence, as between the person for whose benefit the act as passed, and a third person, and that a legislature has no power to find facts by legislative enactment, so as to be evidence in suits against persons who were not applicants for the act: Elmondorff v. Carmichael, 8 Little 472; Parmeles v. Thompson, This is an obvious rule of evidence, but it has no application here. If, as is admitted, the legislature had power to repeal the charter, it had the power to state the reasons which induced it to act. A statement of the reasons was not indispensable to the validity of the repeal; but was proper for the information of the public and of the corporation. This resolution is not a judicial act, finding that a forfeiture of the charter has taken place. If it was, it could well be urged that a legislature has not ordinarily judicial powers, and that the attempt to exercise judicial functions is void; but the resolution is a legislative act, declaring the repeal, and not the forfeiture of the charter, and the recitals are not in the nature of judicial findings of facts, but the statement of the reasons which operated upon the legislative mind.

"The inquiry into the affairs or defaults of a corporation with a view to continue or discontinue it, is not a judicial set. No issue is formed. No decree or judgment is passed. No ferfeiture is adjudged. Ne fine or punishment is imposed. But an inquiry is had in such form as is deemed most wise and expedient, with a view to ascertain facts upon which to exercise legislative power, or to learn whether a contingency has happened upon which legislative action is required:" Crosse v. Baboock, 23 Pick. 844.

2. The complainants insist that the legislature must of itself determine whether an enactment shall or shall not be a law, and

cannot delegate the power to make or repeal laws; that the attempted repeal of this charter is delegated to the insurance commissioner, and is therefore void.

The resolution provides that the charter shall be repealed on Beptember 1st 1875; provided, if the company shall, before that day, receive a certificate that the deficiency in its assets has been supplied, then the charter shall remain in full force; and, in case of a disagreement between the commissioner and the company as to the amount of its assets, the Chief Justice and his associate shall determine and state the amount to be paid in, and if the amount so found shall be paid within thirty days, the resolution shall be inoperative and void. I am inclined to the opinion that, by this resolution, the charter was repealed, but the repeal was not to take effect, or be operative, if a specified event should thereafter take place, which event was uncertain. The commissioner, subject to an appeal to the Chief Justice and a judge of the Superior Court, was to determine whether that event had taken place. The legislature, for itself, determined and enacted that the charter should be repealed, provided an ovent did not occur in the future: the ascertainment and announcement that the event had happened the legislature entrusted to an officer, or a committee, whom it designated. The legislature delegated to no one the power to determine whether the charter should or should not be repealed. It delegated the duty of accertaining whether a fact existed, upon the existence of which it had determined that the repeal should not go into effect.

- "A valid statute may be passed to take effect upon the happening of some future event. Certain, or uncertain, it is a law is presenti, to take effect in future. The event, or change of circumstances, must be such as, in the judgment of the legislature, affects the question of the expediency of the law. The legislature in effect, declares the law inexpedient if the event should not happen, expedient if it should happen. They appeal to nebedy to judge of its expediency:" Barte v. Himred, 8 M. Y. 488, per Ruesland, C. J.
- 3. The complainants further say that the charter is not repealed until after the decision of Judge PARK and his associate; that the logislature has no power, either before or after the repeal, to take the assots of an insurance company out of the hands of its officers, and to transfer the successful of the property to a third person, who

is to hold them, subject to the order of an individual, acting not so a judge, and exercising no judicial functions, and not necessarily guided by the principles of law, and from whose order there is no appeal; that the resolve is a special and personal statute, prescribing an exceptional and peculiar rule of conduct upon this single corporation; and therefore unjust, and in violation of legislative power.

The original resolution, which was reported to the legislature, contained the first provise only. As reported, it manifestly provided that the charter should be repealed on September 1st 1875, unless upon the happening of a certain event, the repeal should not go into effect. An amendment was added, by which in case of disagreement between the commissioner and the insurance company, another committee was appointed to ascertain the amount of deficiency, if any, and if the amount, so ascertained, should be paid in, the resolution should be inoperative and roid. It is a question which it is not now necessary to determine whether the charter is already repealed, or whether its repeal occurs at the expiration of the time which is limited for payment of the deficiency, if any there be, which may be found by the two judges, and upon non-payment of the amount. I have already suggested that the true construction is that the charter is repealed, to take effect or not to take effect, upon the happening of an uncertain event. If the charter is repealed, there can be no doubt of the ' power of a legislature to appoint some person to act merely as custodian of the assets of the corporation. But assuming that the charter is now in existence and unrepealed, I am of the opinion that the legislature has the power, if in their opinion the public interest and the rights of the creditors of a particular corporation demand it, to take away the custody of the assets of such corporation from its directors and intrust the custody to an officer of the state, pending an investigation into the company's solvency, and the determination of the fact whether the event has happened upon which a repeal of the charter will take place. It is apparent from ". an inspection of the resolution that the legislature deemed the corporation incolvent, and that the liabilities exceeded the assets 400,000, and also was of opinion that the corporation had not complied with the requirements of law and that the affairs of the company were in so precarious a position that it was proper to take the unusual step of repealing the charter. But the legisla-

ture was also willing to give the company an opportunity of making good the deficiency, and further was willing not to permit the decision of the insurance commissioner, upon the question whether the deficiency had been supplied, to be final, but to intrust the final hearing and determination in regard to the sufficiency of assets to two persons, whose judicial position peculiarly adapts them to pass upon disputed questions of facts, and whose efficial character precludes the suspicion that injustice might be done, and should assure the creditors that their rights are to be granded. That investigation would necessarily consume time. The question presented itself. Do the interests of the cestuis que trust in the preperty of the company require that, during the investigation, the assets, which in our opinion have seriously impaired, shall remain in the hands of the directors? The legislature decided to place the assets, for the time being, in the custody of on officer of the state, and derived their power so to do from the general power. which had been reserved over the affairs of this particular cosperation, that of amendment of its charter at its pleasure. "Whatever might be true, if the charter was a close one, the General Assembly could impose upon the defendants any additional conditions. or burthens connected with the grant which they might deem necessary for the protection or welfare of the public, and which they might originally, and with justice have impeced:" English v. N. H. A Northampton Co., 82 Conn. 248; Commissioners, So., v. Holyoke Waterpower Co., 104 Mass. 446. It is not processary that the resolution should be styled an amendment: Bishes v. Brainard, 28 Conn. 298. The legislature has reserved to sheelf the control of this charter, and can modify it to meet say axisance which may arise in the affairs of the corporation; and where the legislature has determined that the pecuniary interests of the crediters are so imperilled that the necessity of repealing the charter may arise, it would seem that the legislature has the power to peovide that the officer, who has the oversight of all the insurance companies of the state, is the proper person to have the exclusive custody of the assets of this corporation, and act as the treasurer for the time being. The legislature could originally have imposed this condition upon the company: they can impose it at any time: when they deem it necessary for the protection or welfare of the corporation.

It is also carnestly contended that the resolution directs the coup-

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missioner to hold the assets subject to the order of a committee, not acting judicially, and from whose order there is no appeal, and who in his directions is not necessarily acting in conformity with principles of law.

It is true that the Chief Justice will act as a committee or agent of the legislature, and not strictly in his judicial capacity, and if the resolution and the general statutes in regard to life insurance corporations, whose charters have been repealed, placed the assets under the control of a committee, to be disposed of as the committee pleased, and without the control of the courts of the state, such acts would properly be the subject of severe criticism, and might be declared to be inoperative. This resolution simply empowers the commissioner to hold the assets. He cannot sell or dispose of them under the resolution, but is merely their custodian.

The Chief Justice has only authority to notify the commissioner either to return the assets to the company, or that the event has not taken place upon which the repeal of the charter is avoided, after which the commissioner is to be governed by the general statute.

. He then becomes a trustee under the exclusive direction and control of a court of equity, and subject to its decrees.

The assets are not to be managed or disposed of, and the available are not to be paid in accordance with the order of a committee, but in pursuance of the general statuter and under the direction of the Superior Court, a court of general jurisdiction, and of full chancery powers. The weight of the compiainants' argument bore upon the clause of the resolution which they considered most unjust and prejudicial to their interests. I think that they musupprehend the nature of the powers of the Chief Justice over the accets, which is so limited that there is no interference with the rights of creditors.

Upon the argument of the motion, the previsions of the general statute were criticised by the complainants. The bill does not ask for the interference of the court upon the ground of the invalidity of the statute, but the court is asked to prevent the commissioner from taking possession of the assets under the authority of a resolution of the General Assembly, which is alleged to be void. I do not does it therefore incumbent upon me at the time to consider the character of the statute.

The suggestion which has been made in regard to the control of the legislature over those charters, in which a power of amendment or repeal has been reserved, applies to the objection that this resolution is a special and poculiar law by which the rights of this corporation are to be jeopardized, differing from the law applicable to all other corporations in like condition. All insurance companies in Connecticut are created by special charter. Each company is under the particular supervision of the legislature, and is liable, in case of insolvency or malfonsance, to be controlled by such action, applicable to the special case, as shall serve to protect ereditors, or shareholders, or the public.

Sundry assidavits were read for the purpose of showing that Mr. Stedman had not informed the company, prior to September 1st, of the amount of the alleged desciency, and had not given the company an opportunity to supply the required amount, and had not acted justly towards the company since the passage of this resolution. Counter assidavits were presented by the commissioner. If any steps were to be taken by the commissioner in advance of the action of the company, prior to September 1st, in regard to which I express no opinion, I am not satisfied that the commissioner failed to do whatever the resolution, or the statutes, or the duty which he owed to the corporation, or to the public, imposed upon him. The corporation does not seem to me to have suffered in consequence of a neglect of the commissioner to keep them informed of his views and wishes.

The motion for a provisional injunction is denied, and the restraining order now in force is vacated.

Supreme Court of Delaware.

THE STATE AS REL LYNCH & BRATTON.

The father is pried forir entitled to the centedy of his children, and where he is of good character and able and willing to maintain them, his right is paramount to that of all other persons, except in the single case of an infant of such tender, years as to necessarily require for its own good the case of its mother.

But the father's right is not absolute or unqualified. He may relinquish or forfalt it by contract, by his had conduct or by his migistrane in being analis to give it proper care and support.

^{*} We are inducted to W. C. Spreames, Erg., for the report of this com.—Bo. Ass. Law Ros.

Where a father has, through his fault or his misfortune, lost or forfeited his right, and subsequently, by reformation or otherwise, reinstates himself in a position to properly care for and maintain his child, his right does not necessarily revive, but a sourt upon habres corpus will exercise a sound discretion in view of all the eigenmeatances with reference to the welfare of the child itself.

A court will never order a child into the custody of an improper person, but where the child has reached the age of discretion the court will in many cases allow it to make its own choice, even though it choose a person whom the court would not voluntarily appoint.

There is no fixed ago at which the period of discretion is considered to begin. It depends on the capacity of the child to reason sensibly, though as a child, in regard to its condition, its feelings, and its future welfare.

Courts have no jurisdiction over the religious discipline and instruction of children. Such matters are proper to be taken into consideration among other elementances, in determining the custody of children where it is in dispute, but a difference in regard to religious views does not of itself afford any ground for interference by the court on petition of a father who has lost or forfeited his right of custody, with the person who has acquired such right.

HABBAS CORPUS.

The facts are stated in the opinion of the court, which was delivered by

WALES, J.—The writ of habeas corpus in this case was issued upon the petition of John F. Lynch, and directed to James Bratton, commanding him to bring before me the persons therein named, together with the cause of their being taken and detained.

On the day appointed for the return of the writ and the hearing of the petition, Mr. Bratton produced the persons named in the writ, to wit: Mary Lynch, aged 16; John Lynch, aged 9, and James B, Lynch, aged 6; and also made a return in writing and under oath, in which he certifies the causes of their detention by him. The substance of them is that the said Mary, John and James are the children of John F. Lynch and Emma J. Lynch, who were married on the 5th of February 1856; that Emma was the daughter of the respondent, who, in the month of October 1859, Ending that the relator was anable to support his wife and two children, William, then two years old, and Mary, an infant of three weeks, took them to his own house, where they remained until March 1866; that during this interval Emma and her children Hved separate from the relator, who contributed nothing whatever to their support; that in the early part of 1868 Emma and her children went to live with the relator in Wilmington, where he had commenced business; that about this time, or shortly after, and the relater acquired habits of intemperance which grow to be so

confirmed and excessive that he not only neglected to provide for his family, but treated them with extreme cruelty, so that in December 1870, the said Mary was compelled to return to her father's house and has ever since lived with the respondent; that for three years the relator paid no rent, and the respondent had to contribute to the support of the said Emma and her children; and that finally, on the 14th of March 1878, in consequence of the continued intemperance, neglect and cruelty of her husband. Mrs. Lynch obtained from the legislature of Delaware an act of diverce, a vinculo, by the 2d section of which it was enacted, " That the said Emma J. Lynch shall have the sole care, charge and custody of her children." The return further sets forth that on the 10th of August 1878, the said Eurona died, having committed the care of her children to the said respondent and his wife, who took them and have ever since wholly maintained them, except so far as the wages of the eldest child, William, aided in his support; that said William died in August 1874, at the house of the respondent; that the relator in April 1874, married again, and now resides in Philadelphia; that the respondent is able and anxious to support the said children, who are much attached to him and his wife, and desire to remain with them; that it would be greatly detrimental to the interests of the children to remove them from their present home and commit them to the custody of the relator, who by his violent temper, his intemperate and improvident habits, is wholly unfit to take care of them, and has forfeited all right to them, and that in addition to this, whatever right of custody he may have had is completely annulled by the act of divorce.

To this return there was a general denial on the part of the relator, but more particularly to that portion of it relating to his present character and conduct and his fitness to have charge of the children. It was alleged that since his last marriage he has reformed his habits and established a new position in society, entitling him to the respect and confidence of his friends and neighbors, and to the restoration of his paternal rights.

A number of witnesses testified to the material facts contained in the return, and the private act of divorce, duly authorized and recorded, was exhibited. One witness swore that he had seen the relator intoxicated since his last marriage.

On the part of the relator it was shown, that for nearly two wears nest his life has been industrious, sober and reputable: that

he is earrying on a fair business, and is able to maintain and educate his children. On these grounds it was claimed by his counsel that the only question to be considered was, whether John F. Lynch is not fit and capable to have the charge of his children, he having the legal right to their chatchy; since the legislative act usigning them to their mother, being in the nature of an interlocatory decree, was not final or conclusive, and the trust thereby imposed on the mother had being transmissible by descent, on her death the rights of the father revived. It was also argued that something was due to the repentance and reformation of the relator.

It is not necessary to review the evidence in detail. Brough has been stated to afford room for the application of the legal principles which will govern and control the decision of the case. These principles are to be found in the modern text-books, and in a long and ample current of authorities from Lord Blanspizzo's time to the present. The right of the father to the custody of his infant child grows out of his duty to maintain, educate and protect M, and while he gives it education and support, he is entitled to He services. But this right is not an absolute one, and is often made to yield when the best interests of the child require that it should. Society, also, has an interest in the welfare and morals of children, and it is for the public that, in determining questions of custody, the good of the child should be the leading considerstion. Where the father is a man of fair character, of a just disposition, and is able and willing to take care of and provide for his children, he is vested with the paramount right to their custody. The only exception to this is in the case of an infant of tender years, whose helpless condition and physical wants require the nurture of its mother: D'Hauteville's Case (Pamph.) As long as he retains this character and ability he cannot be deprived of his paternal rights; but be may lose or forfeit these rights by his own relentary act, by his misconduct, or by his misfortunes. He may emancipate his child by contract, as when he consents to its adoption by another, or sends it abroad to make a living and shift for itself: Farrell v. Farrell, 8 Hount. 688, or abandons it to the world; by his conduct, when he neglects to provide for its support, treats it with excessive crucky, or leads such a grossly immoral and profligate life as to endanger its morals and corrupt its heart by his evil example; by his misfortune, when he becomes long involuntary absence, during which the child, thrown on the charity of the world, has formed new relations and found a new home.

Yet in all these cases the law has such a tender regard for the natural affection and rights of the parent, and for the welfare and happiness of the child, that, if the latter has reached the age of discretion, the court, under a habcas corpus, in the exercise of a sound discretion, will remove all restraint, and allow it to make its own choice, and go where it pleases, but will never order it into the custody of an improper person, or under some circumstances permit it to go into such custody. The age of discretion is ascertained not only by the years of the child, but by its capacity, information, intelligence and judgment. The court will look to all these evidences of capacity, and " if it finds the child able to reason sensibly; though as a child, in regard to its condition and its preforences and its prospects, it will take its wishes into consideration." In Commonwealth v. Taylor, 3 Metc. 72, Chief Justice Snaw said, "In point of law, a child of such tender years, seven or eight, has no will, no power of judging or electing; and therefore his will and choice are to be wholly disregarded. The natural and strong feelings of a child, which induce him to cling instinctively to those whom he has been accustomed to regard as his natural. protectors, cannot be regarded as the exercise of a legal will or an intelligent course." In Commonwealth v. Hammond, 10 Pick. 274, the child was between eleven and twelve, and its wishes were consulted. In The People v. Chegaray, 18 Wend. 637, there were three children, aged respectively afteen, thirteen and nine They were all consulted respecting their wishes. McDowle's Case, 18 Johns. 328, the youngest child was not more than nine, and was consulted in respect to his wishes not only by the chief justice, but afterwards, on a suggestion that improper means had been used by the master, by three gentlemen of the bar appointed by the court, and his wishes were respected. In State v. Boott et uz., 10 Foster 274, the child was eleven years old. The court appointed a committee of three members of the bar to interrogate the child, who reported that she was of sufficient understanding to choose, and the court suffered her to make her election. These and other like cases show the standard and mode by which courts are accustomed to ascertain the age of discretion. It was

the relator through his counsel withdrew his demand for the custody of his daughter Mary, upon her expressing her choice to remain with the respondent. The two younger children are not quite enough advanced in age or understanding to come within the rule of discretionary choice, and their custody must therefore be decided on the general principles already stated, and the particular circumstances of the present case. In Rez v. Delaral et al., 8 Burr. 1484, decided in 1768, it was held by Lord MANSFIELD, that the court is bound ex debito justities to set the infants free from improper restraint; but they are not bound to deliver them over to anybody, nor to give them any privileges. This must be left to their own discretion according to the circumstances that shall appear before them." And in the same opinion he said, "the true rule is, the court are to judge upon the circumstances of the particular case, and to give their directions accordingly." Chancellor WALWORTH, in Mercien v. The People, 25 Wend. 64, says, "The American cases show it to be the established law of this country that the court or officers are authorized to exercise a discretion; and that the father was not entitled to demand a delivery of the child to him, upon habeas corpus, as an absolute right." Chief Justice SHAW, in Commonwealth v. Briggs, 16 Pick. 208, where the court laid down the stringent rule of the paramount authority of the father, decides that, " As a general rule the writ of habeas corpus and all actions upon it are governed by the judicial discretion of the court, in directing which all the circumstances are to be taken into consideration. In the case of a child of tender years, the good of the child is to be regarded as the prominent one." In that case the wife had separated from her husband without lawful cause, taking with her their only child, and, in allusion to this circumstance, the learned chief justice further remarks: "The court ought not to sanction the unauthorized separation of husband and wife by ordering the child into the custody of the mother, thus separated and out of the custody of the father. If there be any good cause of divorce, either a rincule or a mensa, and proceedings are instituted, the court will then make such order as to the custody both of the wife and the children as the circumstances of the case may require." In the D'Hauteville Case, heard before the court of General Sessions of Philadelphia, in 1840, it was decided by the court, and admitted by the counsel of the relator, who was seeking possession of his

child, that the right of the father to the custody of his child becomes forfeited either by his unfitness to take charge of its morals and interests, or by such misconduct as would afford good ground for a divorce a vincule matrimenii. There was no authority cited on the part of the relator in the case now before me, qualifying, much less contradicting, any of the doctrines just used. The case in 2 Conn. 20 related to the settlement of a pauper child whose parents had been divorced, and was a contest between two towns as to which of them should be burdened with its support, and did not touch the question of custody. It is the common practice when a divorce has been obtained, either by legislative enactment or by a judicial decree, that the children are taken from the party for whose fault the divorce was granted, and given to the innocent parent. In this respect the case of the relator is not an exceptional one.

In view of these principles and of the evidence submitted at the hearing, it is difficult to understand on what ground or protonos the relater can demand the possession of his children, except upon the theory that there has grown up in his heart a new and sincere love for his offspring, consequent upon his reformation and his repentance for the past, and that he desires from the purest and best motives that can actuate human conduct, to have their cuetody, that he may enjoy the comfort and pleasure of their society. But all this, while it may excite sympathy and move to pity, does not restore his forfeited rights, which are, as far as concerns this proceeding, as if they had never existed. There is no element of principle or of fact to reason upon in his favor. The law and the evidence combine to pronounce against his claim. No reported case can be found in which there is less show of right. Admitting that the death of Mrs. Lynch repealed the act of divorce, and that the guardianship of the children was not assignable by her, it does not follow that the father is entitled to have them. After the granting of the divorce and during the life of the mother, he certainly could not have claimed their custody. On her death, they found a new home and formed new relations. Where could they have gone, if the respondent had not opened his heart and house to receive them? The relator had no home to shelter or means to support them. Save for the respondent they might have been east upon the charity of the public. But the act of the legislature is still in force and is conclusive. It abrogated the right of Lynch

to the care and control of his children, and only by their consent can that right be retrieved.

The temporal welfare and interests of the children would not be promoted by removing them from their grand-parents, but it was argued that their father was entitled to direct their religious training, that they were now being taught in a creed contrary to his, and would be trained up to despise and contemn him. It will perhaps depend more on his own future conduct whether his children learn to repeat his name with respect or otherwise, than upon the teachings of those with whom they now live and associate. If he suffers from having his children worship according to a faith different from his own, that is only another consequence of his past course. But it may also be suggested in reply to this argument that the wishes of the mother as to the religious faith of the children should not be forgetten, and are descrying of at least equal consideration. What those wishes were may be inferred from the testimony of the relator's brother. They were not coincident with those of her husband. Over the religious discipline and instruction of children, courts have no jurisdiction. Human laws deal only with the civil rights and duties belonging to the relation of parent and child: 5 Houst. 639. A case might possibly arise in which the religious faith of the relator or of the respondent, might be taken into consideration and turn the scale which would otherwise be even; but the present case is far removed from one of that character.

The appointment of a guardian by the Orphans' Court might be governed by reference to the faith of the minors' parents if brought especially to the notice of the court, and there appeared to be a design to obtain the guardianship with the intent to seduce the child from the belief of its fathers. There is, however, no analogy of principle or similarity of fact in the manner of making such appointments to the matter here under discussion.

The reformation of the relator is too short-lived to build more than a hope upon.

I have thus briefly noticed all the points taken by the relator's councel. They were urged with much seal and plausibility; but his positions cannot be maintained either on principle or authority; and putting saide the learning of the books and the weight of precedents the case has no better foundation in morals or in reason.

The children are remanded to the custody of Mr. Bratton.

United States Circuit Court, District of Oregon. MARCUS NEFF v. SYLVESTER PENNOTER.

A state has the power to subject the property of non-residents, within its tertiturial limits, to the satisfaction of the claims of her eleisess by any made of prosedure which it may deem proper and convenient, and therefore may, for such purpose, anthorize a judgment to be given against such non-resident prior to selsure of such property and with or without notice of the proceeding.

But where a title depending on such experte action comes before a court of another jurisdiction, the proceedings will be closely examined to see that all the statutory requirements for their validity have been complied with,

The common-law presumption in favor of the jurisdiction and regularity of the proceedings of courts of record of general jurisdiction, had its origin in the fact that at common law no judgment could be given against a defendant until he had appeared in the action; but no such presumption does or ought to apply in cases where the defendant is a non-resident, and there was no appearance, and only constructive service of the summons by publication.

This was an action to recover the possession of a half section of land situate in Multnomah county, the same being donation claim 57.

It was alleged in the complaint that the plaintiff was a citizen of California, and the owner, and entitled to the possession of the premises; and that the defendant was a citizen of Oregon and wrongfully withheld the possession of the premises from the plaintiff.

The answer of the defendant tacitly admitted the citizenship of the parties and the value of the premises, as alleged in the complaint, but denied the ownership of the plaintiff and his right to the possession of the premises, and set up a title thereto in himself. The defence of title in the defendant was contreverted by the reply.

By consent of parties the cause was tried by the court without the intervention of a jury, and afterwards submitted on briefs.

John W. Whalley, M. W. Fechheimer and W. W. Page, for plaintiff.

H. Y. Thompson and George H. Durham, for defendant.

DEADY, J.—On the trial the plaintiff proved that a patent to the premises was issued to him by the United States on March 19th 1866, as a settler under the Donation Act of September 27th 1860, and rested his case.

Thereupon the defendant offered in evidence duly certified copies

of the complaint, summons, order for publication of summons, affidavit of service by publication and judgment in the action of J. II. Mitchell v. Marcus Neff, in the Circuit Court of the county of Multnomah, wherein judgment was given against the defendant therein on February 19th 1866, for the sum of \$294.98; to the introduction of which papers the plaintiff objected, because: (1) said judgment is in personam and appears to have been given without the appearance of the defendant in the action or personal service of the summons upon him and while he was a non-resident of the state, and is therefore void; (2) said judgment is not in rem, and therefore constitutes no basis of title in the defendant; (8) said copies of complaint, &c., do not show jurisdiction to give the judgment alleged, either in rem or personam; and (4) it appears from said papers that no proof of service by publication was ever made, the affidavit thereof being made by the "editor" of the Pacific Christian Advocate and not by "the printer or his foreman or his principal clerk." The court admitted the evidence, subject to the objections.

The defendant then offered in evidence a certified copy of an execution issued upon said judgment on July 9th 1866, and the return thereon, from which it appears that the premises in question were sold upon said execution to ratisfy said judgment on August 7th 1866, to J. II. Mitchell, for the sum of \$241.60, to the introduction of which papers the plaintiff objected, because the judgment in Mitchell v. Neff being given without jurisdiction, the execution was void, and further, that the notice of sale upon said execution and attached to the return was no part of either, and therefore should not be admitted. The court admitted the evidence, subject to the objections.

The defendant then offered in evidence three papers, purporting to be deeds to the premises to the defendant, the first being signed by Jacob Stitzel, sheriff of Multnomah county, by his deputy, C. B. Upton, on January 14th 1867; the second, by said Stitzel, excheriff of said county, on July 24th 1874; and the third, by E. J. Jeffery, sheriff of said county, on July 21st 1874; to the introduction of which papers the plaintiff objected, because as to the first one: 1. It was not made to the purchaser at the sheriff's sale. 2. It is not sealed, witnessed or properly acknowledged as a deed. As to the second one: 1. There being no valid judgment proved, the instrument is not a link in the chain of title.

2. It was not made to the purchaser at the sheriff's sale; and as to the third one, for the same reasons as in case of the second one, with the additional one: That it was not executed by the officer making the sale. The court admitted the ovidence, subject to the objections.

The defendant then offered in evidence an assignment by J. H. Mitchell to the defendant of the certificate of purchase of the premises, duted August 10th 1866, to the introduction of which the plaintiff objected, because: 1. There being no valid judgment, assignment is not evidence of title in the defendant. 2. If there were a valid judgment to support the sale to Mitchell, the assignment would pass a more equity to the defendant, to enforce a conveyance from the former after he had received one from the shorts, and therefore it is not evidence of title in the defendant. The court admitted the evidence, subject to the objections.

The defendant having rested, the plaintiff offered in evidence a duly certified copy of the judgment-roll in Mitchell v. Neff, which contained not only the complaint, summons and other parts of the record of that case already introduced by the defendant, but also a copy of the affidavit of the plaintiff therein, upon which the order for publication was made; to the introduction of which the defendant objected, because said affidavit was not properly a part of the judgment-roll. The court admitted the evidence, subject to the objections.

Upon this evidence, the right of the plaintiff to recover is admitted, unless by virtue of the sale of the premiess upon the judgment in Mitchell v. Neff, and the subsequent assignments of the certificate of purchase and the conveyances to the defendant, the legal title passed from the plaintiff to him.

Admitting that the proceedings in Mitchell v. Neff were dely taken according to the statute of the state in the case of non-resident debtors, what was the effect or force of the judgment as against the person of the defendant or his property? It is admitted on all hands that such a judgment is not binding in personam: Story's Con. of Laws, § 589; D'Arcy v. Ketchum, 11. How. 174; Galpin v. Page, 18 Wall. 367. And this rule is expressly declared in the Or. Code of C. P., § 506, as follows: "No natural person is subject to the jurisdiction of a court of this state, unless he appear in the court, or be found within the state, or be a resident thereof, or have property therein; and in the last case

only to the extent of such property at the time the jurisdiction attached."

Nother is it claimed by the defendant that this judgment had any other or greater effect than to enable the plaintiff therein to subject this property to the payment of the debt ewed him by Neff.

But the plaintiff maintains that the court, in Mitchell v. Neff, could not acquire jurisdiction to reach the property of a non-resident or subject it to the payment of his debts, ewed in this state, except by the actual seizure of such property contemporaneous with the commencement of the proceeding or before the readition of the judgment therein.

In support of this position, the case of Galpin v. Page, decided by Mr. Justice FIELD, in the Circuit Court for the District of California, on August 81st 1874, is cited. In this case the learned judge, after showing that "the tribunals of one state have no jurisdiction, and can have none, ever persons and property without its territorial limits," proceeds as follows: "But over property and persons within these limits the authority of the state is supreme, except as restrained by the Federal Constitution. When, therefore, property thus situated is held by parties resident without the state, or absent from it, and thus beyond the reach of the process of its courts, the admitted jurisdiction of the state over the property would be defeated if a substituted service upon the parties were not permitted. Accordingly, under special circumstances, upon the presentation of particular proofs, substituted service, m lieu of personal service, is allowed by statute in nearly all the states, so as to subject the property of a non-resident or absent party to such disposition by their tribunals as may be necessary to protect the rights of their own citizens. * * * A pure personal judgment, not used as a means of reaching property at the time in the state, or affecting some interest therein, or determining the statue of the plaintiff, rendered against a non-resident of the state, not having been personally served within its limits, and not appearing to the action, would not be a judicial determination of the rights of the parties, but an arbitrary declaration by the tribunals of the state as to the liability of a party over whose person and preperty they have no control. The validity of the statute can only be sustained by restricting its application to cases where, in connection with the process against the person, property in the state is brought under the control of the court and subjected to its judgment, or where the judgment is sought simply as a means of reaching such property or affecting some interest therein, or to cases where the action relates to the personal status of the plaintiff in the state."

But I see nothing in this language or the rule as there laid . down, which supports or gives countenance to the position of the plaintiff, unless it be in the statement that the statute giving the right to proceed by publication against non-residents of the state is valid only when restricted " to cases where, in connection with the process against the person, property in the state is brought under the coutrol of the court and subjected to its judgment."

Now, the property was "brought under the control of the court and subjected to its judgment" in Mitchell v. Neff, if at all, by the execution which issued upon the judgment. This process against the property of Neff was issued to enforce the judgment given in pursuance of the process against his person. The one was the inception and the other the completion of the proceeding, and so they were connected together as the links in a chain. Certainly, the process against the property could issue in connection with the process against the person without being exactly simultaneous with it. They were related parts of the same proceeding.

Besides, this judgment, though personal in form, was procured, intended and used simply as a means of reaching the property of Neff then within the state, and according to the rule in Galpin v.

Page, supre, is so far valid and binding.

But the power of the state over the property within its limits, of non-residents, being supreme, and it being admitted on all hands that the state may subject such property "to such disposition by their tribunals as may be necessary to protect the rights of its own citizens," in my judgment, the mode of exercising this power is a matter for the state to determine. In the exercise of this power it may require that the proceeding be strictly in rem and commenced by the seizure of the property, or it may, as provided in this state, upon the proper preliminary showing, permit a suit to be maintained against the non-resident by name—nominally—for the purpose of enabling the plaintiff therein to first judicially establish his right or claim against such non-resident, and then authorize the seizure and disposition of the property so so to satisfy the

same. In either case the result is the same; while the latter made of proceeding has this to commend it over the former, that it does not permit the seizure or interference with the property of the non-resident until the right or claim of the citizen in or to it is estisfactorily established.

Nor does it appear to me that the state is bound in any case to provide for giving notice to the absent party by publication of the summons or otherwise. That matter pertains to the mode of proceeding over which the state has absolute control. The notice usually given is merely constructive, and in a large number, if not in a majority, of cases, gives no information to the absent party. Of course it is the duty of the state to deal justly and considerately with non-residents who have property within her jurisdiction, and therefore it should provide as far as practicable that no proceeding should be taken in her courts to affect such property, without notice to the owner.

It being shown that the state has the power to subject the property of non-residents to the payment of debts owing to her citizens by such a proceeding as may by law be provided, including one in which such property is not seized prior to judgment, but thereafter, and then only for the purpose of satisfying said judgment, it remains to be considered whether the judgment in Mitchell v. Neff was given by a court having jurisdiction to do so according to the laws of the state. * *

The learned judge then proceeds to consider, in detail, the objections to the proceedings, and decides that, as the affidavit on which the order of publication was based did not comply with the requirements of the statute, the court had never obtained jurisdiction, and the proceedings were void. This part of the opinion is emitted so purely local.]

Judgment for plaintiff.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.²
COURT OF APPEALS OF MARYLAND.²
SUPREME COURT OF MICHIGAN.³
SUPREME COURT OF PENNSYLVANIA.⁴

ACKNOWLEDGMENT.

Regutarily Presumed.—The regularity of an acknowledgment taken before a reputable acknowledging officer is presumed, and the burden of proof is with the party contesting an acknowledgment to show misconduct on the part of the officer, or furgery or other irregularity which he ought to have discovered: Hourtisans v. Schnoor, S. C. Mich.

ADMIRALTY.

Collision—Pilet.—In cases of collision, where there is a great conflict of testimony, the court must be governed chiefly by underiable and leading facts, if such exist in the case. The court so governed in this case: The Great Republic, 23 Wall.

A pilot, when he is close to a vessel before him making morements which are not intelligible to him, eaght not, in a case which is in the least critical, to be governed by his "impressions" of what the vessel is going to do. He should make and exchange signals, and ascertain positively her purposed movements and manuseves: Id.

A steamer close to the right bank of a bread river—one, en. gr., a half a mile broad—which means to cross over and land on the left chare, is not bound, in the first instance, to give three or more whichles, which is the signal for landing. It is enough that she give two whichles, which is the signal that she is going to the left. The three or more whichles may be given later: Id.

Constructions not favorable put on the testimony and mensures of a pilot who, it was proved, was "addicted to drinking when ashers," and who confessed to having been drinking on the day when his vessel left port, and within un hour of which time a collision occurred; though he swore that he had not taken any drink for six hours before his best left its dock: Id.

Similar constructions put on the conduct of a captain whose watch it was, but who, instead of being engaged in a proper place in superintending the navigation of his vessel, was on the lower deck converging with a passenger: Id.

A large and fast-sailing steamer is bound to not eastsquely when evertaking and getting near to a small and slow one; and a collision having occurred between two steamers of this sort, a miner shall of the small and slow steamer was held not to make a case for division of demages

¹ From J. W. Wallace, Eog., Reporter; to appear in vol. 24 of his Magoria.

^{*} From J. Shoof Stockett, Keq., Reporter; to appear in 49 Maryland Rop.

From Hoyt Post, Esq., Reporter, and Henry A. Chancy, Esq. Cores decided at January Term 1876. The volume in which they will be reported cannot get by indicated.

where such fault bore but a little proportion to many faults of the large and fast one: Id.

When, in a case of solition, it appears that one of the vessels neglected the usual and proper measures of pressution, the burden is ea her to show that the sollision did not occur through her neglect: Id.

Nogligence—Collision—Ing-boat for Assistance against Fire.—The ewners of a vessel in flamon towed by a tag and no longer in command of her own captain and erew, are not liable for injury done by her to another vessel, by the negligence of the captain of the tag; the said ewners not having employed the tag, she being a tag whose require business was the assistance of vessels in distress, and she having gone, of her own motion, to the extinguishment of the fire in this case: The Clarita and The Clara, 28 Wall.

A vessel anchored in the Hudson, opposite to the Hobeken wherves, if aschored three hundred and fifty yards from their river front, is anchored so far from shore that in case of a collision with a vessel towed in finnes out of the Hobeken docks, no allegation can be made that she

is anchored too near the share: Id.

A vessel at anchor having an anchor-light and one man on deck, though not strictly an anchor-watch, is guilty of no fault in not being

better lighted or watched 1. kd.

A venicl whose business it is to give relief to vessels on fire is bound to have chain hawsers or chain attachments on board; and if having only manife hawsers, she is compelled to tow a vessel out of its dock with such a hawser, which is burnt, so that the vessel on fire gets loose from the tag, and, drifting, sets fire to another vessel, the tag is liable for the damages caused: Ad.

The ewners of a reasel who through their ewn earelessness (or that of their captain) set fire to another vessel, cannot claim salvage for put-

ting that fire out: Id,

AGENT.

Proof of Authority—Res gentz.—In an action for goods sold, the plaintiff testified that defendant said, "if he concluded to take them he would have George come there and tell us no; give us the order." This was not proof that defendant had authorized George to act as his agent to buy the goods, nor justified the admission of the evidence of his statements: Grim v. Bennell, 78 Penna.

An agent may prove his authority when by parel, but his declarations

do paris are not proof of it: id.

An agent's declarations may be evidence against his principal as part of the res gests, if made in conducting his agency, after his agency has

established his authority to speak for his principal: Ad.

George told plaintiff that defendant had concluded to take the goods, and gave plaintiff a memorandum to ship the goods to defendant, to whom George was indebted. Defendant testified that he had given no order for the goods. Evidence that ut the time of the delivery of the goods to defendant he said he had bought them from George and gave him credit on his books for the price, was admissible: Jdl.

Declarations to become part of the respects, must have been made at

the time of the act done: M.

ALLUYION.

What is—Boundary.—Where a survey begins "on the bank of a river" and is cervied thence "to a point in the river," the river-bank being straight and running according to this line, the tract surveyed is bounded by the river. It is even more plainly so when it begins at a past "on the bank of the river, thence north five degrees east up the river and binding therewith:" Chanty of St. Chair v. Louingaten, 23 Wallace.

Allevies means as addition to riparine land, gradually and imperceptibly made, through causes either natural or artificial, by the water to which the land is contiguous: Id.

The tent of what is gradual and imperceptible is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on: M.

It matters not whether the addition he to atreams which do everflow their backs or these that do not. In each case it is allevion: Id.

APPLICATION OF PAYMENTS. See Limitations.

BANKBUPTCY.

Consent of Distors to Judgment.—A judgment-debter having purchased land before the lien had expired, spread by amicable seire fucion to revive the judgment so so to create a lien on the after-acquired had. Within four months he was declared bankrupt. Held, that the agreement was not in fraud of the bankrupt law: Kemmerer v. Thei et al., 78 Panna.

The circumstance that a debtor consents to do what was for his own advantage would not affect the creditor with knowledge of incolvency, which from other facts he had no resconsble cours to believe: M.

The bankrupt's real estate was sold by the sheriff, who paid the judgmont-oraditor in the revived judgment. Hold, that the Court of Common Pleus had jurisdiction to cutertain a suit by the assigness in bankruptcy for the recovery of the money so paid, if the judgment had been in fraud of the bankrupt law: M.

Attrohment—Construction of Sections 14, 35 and 39 of the Bankrept Act of 1867.—The failure of the defendant to appear and defend an attachment against his property, is no evidence of his having done any act to procure the attachment within the meaning of section 35 of the Bankrapt Act of 1817, or to procure or sufer his property to be taken under legal process within the meaning of section 30 of said act: Manholmen and others v. Smith, Assignee, 42 Md.

Section 14 of the Bunkrupt Act refers, and can only refer, to attachments which are pending at the time the patition in bankruptcy is filed, and not to such as have been presecuted to a judgment prior to the filing of such petition: Id.

The attachment having been properly issued and presented to judgment, that judgment is final, imports shoolate verity, is conclusive with respect to the subject-matter adjudiented, and cannot be re-examined or impossible in a colleteral preceding: Id.

BILLS AND NOTES.

Forgod Draft-Bossery from prior Endereer.-An Indian bank

drew on a Philadelphia bank in favor of the cashier of a New York bank; the draft was stolen, the name of the cashier (payee) forged as codurer and passed to defendants, October 16th, in payment of goods cold to the helder, they giving to him a check on the Philadelphia bank for the difference, which was drawn, and the draft, endowed by the defendants, was deposited to their credit in the same bank. After learning of the fraud, on November 2d the bank demanded payment of the draft from defendants. Held, that the demand was in time: Chambers et al. v. Union National Bank, 78 Penns.

Under Act of April 5th 1849, the amount of the draft could be reco-

vered back from the defendants: Id.

The helder of a draft which is endorsed and passed by him, guaranties the prior endorsements: Id.

BOUNDARY. See Alluvion.

CAPTURED AND ABANDONED PROPERTY.

Factor not Owner.—Under the Abandoned and Captured Property Act, which gives to "the owner" of any such property a right, after it has been sold by the government, to recover the proceeds of it in the Treasury of the United States, a factor who has merely used advances on the property—there being another person who has the legal interest in the proceeds—is not to be regarded as "the owner;" at least not to be as regarded beyond the extent of his lien: United States v. Villalange, 23 Wallace.

CHATTEL MORTGAGE. See Debtor and Creditor; Replesia.

COLLISION. See Admiralty.

CONTRACT OF LAWS. See Illusband and Wife; Intexicating Liquers.

CONTRACT.

In Restraint of Trade—Equity—Damages.—A mother sold her place of business and contracted that "she will not engage in the same business, directly or indirectly," in the Twenty-second Ward, within ten years, but would by her counsel promote the business of the purchaser; she bought a let sud put up buildings suitable for the business for her son; she edomeced maney to him for carrying on, as she had done to other children in their business. The master found that the business was really that of the son and not that of the defendant, was carried on by him on his own credit and means, and not by her. There was no evidence of injury to the purchaser. Under a bill to restrain her from adding in the business, permitting the premises to be used for the business, or selling the property to be used for the business: Held, under the circumstances an injunction should not be decreed: Harkinson's Appeal, 78 Peans.

Agreements in restraint of trade generally are void; to be valid they must be limited in time or partial in their operation and supported by a

pullicient consideration: Id.

That a court of equity may enjoin against the free exercise of a trade,

the violation of the agreement should not be doubtful: Id.

Cortainty is an emential element in the contract whose enforcement is cought by on injunction, and some appreciable damage abould be their : Id.

When damages will compensate the benefit derived or the less suffered, equity will not interfere by injunction: ki.

CRIMINAL LAW.

Murder—Evidence—Degree.—On a trial for murder it was competent to give evidence, for the purpose of showing motive, that the primese and the deceased both visited the same woman; that just after the beariside the prisoner said he had warned deceased not to visit her, she would prove a curse to any man, and now it had come to pass: McCon v. Commonwealth, 78 l'enna.

Unless the Commonwealth shows "ingredients" of murder in the first degree, no presumption arises from the killing that the offence is

higher than murder in the second degree: Al.

If the evidence shows that from which it may be reasonably essented that the murder was wilful, deliberate and premoditated, it is for the jury to pronounce the degree, and the power of the Supreme Court, under the Act of February 15th 1870, to determine whether ingredients of murder in the first degree existed, cases: Id.

If the killing was not accidental, malice and a design to kill are to be presumed from the use of a deadiy weapon, the law adopting the retional belief that a man intends the usual, immediate and natural consequences

of his voluntary act: Id.

Where upon a conviction of murder in the first degree the second does not show that before sentence the prisoner was saked if he had anything to say why sentence should not be pronounced, it is error, and the sentence will be reversed and the record remitted, that he may be continued afresh: Id.

DAMAGES. See Troper.

DERTOR AND CREDITOR. See Equity.

Chattel Morigage—Time of Program—Premature Science by Morigage.—A mortgage of chattels who had expressly fixed a commit time and place for the payment of the mortgage, the time being a few days later than the date of the maturity of the dobt, made binnelf a wrong-door by seizing the chattele on the day before the day he had fixed for payment; payment on that day would have been a satisfaction of the dobt: Bexter v. Spencer, S. C. Mich.

DEED. See Acknowledgment.

DIVORCE. See Husband and Wife.

Equity. See Contract; Municipal Corporation.

Debtor and Creditor—Jurisdiction in Equity—Parties—Multiferium ness.—A creditor who has exhausted his remedy at hw by a fruitless execution on his judgment, has the right to ask the sid of a court of equity to discover and reach the equitable assets of his debtar, including property purchased by the debtor in the name of mother, and to have fruidlent conveyances standing in his way and covering up the property not saids and vacated. Jurisdiction in equity to great such relief is clear, and established by abundant authority: Prope of al. 4. Ekinner, 42 Md.

In such a proceeding, where part of the property pursued has been mortgaged, but no relief is anught against the mortgages, whose mortgage is not assailed, and whose title under it is conceded to be valid,

such mortgages is not a necessary party to the proceeding: Id.

Where the object of the bill is to obtain satisfaction of the complainants' judgments out of the assets and property of their debtor, which they sliege he has fraudulently concealed and oneveyed to different parties, the several persons to whom he has thus conveyed distinct parcels of his property, real and personal, for the name fraudulent purpose, may be joined with the debtor in the bill, though such persons may have no common interest in the several parcels on conveyed, and no joint fraud in any one transaction be charged against all of them:

ESTOPPEL

Repudiation of Contract—Plending.—One who has repudiated a contract is estopped from afterward claiming the benefit of it for the purpose of turning the other party out of court on the ground that the latter should have such him on the alleged contract, instead of under the common counts: McQueen v. Gamble, B. C. Mich.

EVIDENCE, See Agent.

Shop books—Testimony of Parties under Act of 1809.—Prior to the Act of April 15th 1869 (Witnesses) books of original entry were the evidence, the oath of the party was supplementary. Since, the party is a competent witness and may prove his claim as a stranger would have done before: Nichola et al. v. Hoynes, 78 Penna.

Lemping charges in a book would not stand as evidence, but the testimony of the party that the entry was composed of items known to him to have been furnished would be competent to go to the jury: Id.

The party's knowledge that the sum was correct would make it evidence; the credibility as to it would be for the jury: Id.

GIFT.

Delivery must be according to Nature of Article—Ilusband and Wife.— To perfect a gift, the delivery must be necreting to the nature of the thing—an actual delivery, so far as the subject is capable of it, must be the true and effectual way of obtaining the command and dominion of the subject: Bond v. Bunting, 78 Penna.

If the thing be not capable of actual delivery, there must be some set equivalent to it; the owner must part both with the possession and de-

minion of the property: Id.

If the thing be a chose in action, an assignment or some equivalent

instrument must be actually executed: Id.

Wherever a party has power to do a thing, and means to do it, the instrument he employs shall be so construed as to give effect to his intention: Fil.

The provisions of the Married Woman's Act, April 11th 1848, are confined to powers given to her husband to sell and dispose of her real and personal property. A wife may assign her chosen in action, her husband joining, without acknowledgment of any kind: Id.

GUARANTY.

Liability of Guaranter—Planding—General Demurrer—Sufficiency of a Declaration.—The obligation of one signing and sealing a guaranty, which it was intended should be signed by him alone, in not impaired by the fact that the guaranty concluded "in witness whereof we have hereunte set our hands and affixed our scal:" Mitchell v. McCleury, 43 Mid.

In an action by the lorent of certain premises against a generator on his guaranty in writing that the lease of said premises should pay the rent and comply with all his obligations in the lease, the declaration averred that "the defendant did on the day of the execution of said lease and as part thereof, and prior to, and as a condition precedent to the making of said lease and to the delivery of said property, guarantee in writing unto the said plaintiff in manner and form as follows;" and then followed the guaranty ipsissimis verbis. The declaration also repeatedly averred that the guaranty was a part and parcel of the consideration for the lease; that the lease was made on the faith of it, and that the premises were delivered, and the leases took presession of them under and subject to said lease and guaranty. On a general denurror to the declaration, it was Ifeld: 1. That the declaration was sufficient; 2. That the guaranty being absolute, and not a more overture or offer to guarantee, notice of its acceptance was not required to make the guaranter liable thereon: Id.

HUBBAND AND WIFE. See Gift; Replevia.

Choses in Action—Linbility of the Estate of a Husband for a Doll contracted by him in favor of his Wife, as against the Chains of subsequent Creditors.—A married woman being entitled to a distributive share of the proceeds of the real estate of her father, sold under procoodings for a partition, nold her share with the concent of her husband, and took the note of the purchaser for the purchase money. This note the husband collected as a loan by his wife to him upon an agreement with her, to repay it to her with interest, and gave her his note for the amount due her. Afterwards, the husband becoming embarramed, in order to protect his wife's claim paid two judgments against himself and caused them to be entered to her use. The validity of this transaction being impossible by subsequent creditors of the husband as in fraud of them, it was Ifold, Int, That the husband did not reduce the choes in action of his wife into his presention by virtue of his marital rights, but in pursuance of his agreement with his wife obtained central of the note; and his agreement to repay her the amount he collected on it was founded upon an adequate consideration; 3d, That the risin of the wife was manifestly just and should be allowed: Drury v. Briscos, 42 Md.

Marriage— Proof of — Declarations—Reputation—Statute—Extraferritorial Effect.—Where an illicit connection has once existed, it is incumbent upon those who set up subsequent marriage between the parties, to show when and where it occurred; and having undertaken to prove that a valid marriage was celebrated at a particular time and place, the parties cannot be permitted, if the evidence should be insufficient to establish each marriage, to rely upon other facts and circumstances as the ground of presumption that a marriage may have taken place between



the presumption in such case being that the conthe parties continued to be illicit, until that presumption y distinct proof of marriage: Bernum v. Barnum et al.,

Torrings may be proved is civil cases, other than actions for acdnotes, by reputation, declarations and conduct of the parties; but when reputation is relied on, that reputation, to raise the presumption of marriads, meant be founded on general, not stivided or singular opinion; and where reputation is such case is divided it amounts to no evidence at all. And so with respect to the declarations of the parties; the value of such declarations as evidence will always depend upon the circumstances under which they were made: Id.

The declarations of a mother as to the marriage of her son, are admissible after her death, to show that one who claimed and was admitted

. to be his see, was illegitimate: Id.

F General repute in a family, proved by serviving members of it, is adtainfile upon a question of marriage; Id.

Open a question of legitiment the declarations of a father that his

see was filegitimate are competent evidence : .[d].

The act of a state logislature declaring that A, was thereby constituted a legal heir of B, confers no especity upon A, to acquire property beyond the state possing the not: M.

Diserce.—A decree pro confesso cannot be made upon a libel in diverce.

If either party does not attend, the court want decide on testimony taken
be parts: Killern v. Field et nz., 78 Penns.

A contract between bushend and wife, pending proceedings in divorce, the pay her a sum of memory, the consideration of which was, in whole or in part, that she would not oppose the divorce, is void: M.

INSURANCE.

Life policy—Completion of Contract.—A., of San Francisco, aged offenty-six, applied, on the 5th of June 1867, to the agent there of a New York life incurages company to insure his life, the money to be payable "at forty-five or donth," and the policy to take effect from the date of the application. The agent acknowledged the receipt of \$09.30 on the first quarterly premium, with a provise that "said application shall be accepted by the company; but should the same be declined or paiceted by said company, then the full amount paid by A. will be returned to the applicant on the production of this receipt." In fact, A. (M) upt pay any money at this time, but only gave a prominery note for the \$10.20, which note he never, at any time, paid:

Upon the trial, the court below (to which the case was submitted without the interrention of a jury, under the Act of March 3d 1805, which meets that the court may, by agreement of parties, find the facts, and that the finding shall have "the same effect as the finding of a jury,") found, as a fact, that the company "scoopted" the application and east a policy to its agent; "but that the policy did not in terms agree with the memorandum as to date and time of payment." The pulley sent under the quarterly payment \$00.60 (a difference in A's fivur), and the policy was amteriated so as to run from the 5th day of

April 1867—a day which the policy showed was the applicant's hirthday. This variation was, of course, against his interest. Accompanying the policy sent to the agent were two receipts for premiums, executed by the company in New York, one as of the 5th of April 1867, and the other as of the 5th of July 1867, under which receipt was a " Notice to policy-holders," that unless premiums were paid on or before the day they became due, the policy was forfeited and void; that agents were not authorized to make, alter, or discharge contracts, or waive forfeitures; that payments of premiums to agents were not valid unless receipts were given, signed in New York by the officers of the company, the local agents to countersign them as evidence of payment; and that all premiume were payable in New York. The policy and these receipts reached the agent at San Francisco on the 2d of August, having been executed in New York, probably twenty-three to thirty days before. The agent countersigned them, and on the 8th (six days after receiving it) wrote to A., then absent from home, informing him that his policy had arrived, and asking whether he would have it sent to him or held subject to his order. It did not appear whether A. received or did not receive the letter. On the 21st of August he was shot (becoming at once insensible), and died on the 20th of September. Held, that owing to the change of terms in the policy from those contemplated by A., the applicant, the acceptance by the company was a qualified acceptance which A. was not bound to accept; that there having been no evidence that he did accept it, the company was not bound: Insurance Co. v. Young's Administrator, 28 Wall.

INTOXICATING LIQUORS.

Contract by Foreign Vendor.—The agent of a foreign liquor-ceiling establishment obtains an order which he sends to his employers for approval. Hold, that there is no completed contract until the order is approved and accepted, and that if that is done entelds of the state, it is a foreign contract, and not void as in violation of the liquor has of Michigan: Kling v. Frice, S. C. Mich.

Illegality and bad faith are not to be presumed against a foreign con-

tract, but must be shown: Id.

LANDLORD AND TENANY.

Constructive Eviction—Implied Obligation on the part of a Landland,—N. leased to G. certain property to be used as a distillery, at \$135 a month, payable monthly. As a preliminary to the use of the distillery, it was necessary for the leases to file with the United State collector the written consent of the leases as the owner in fee of the property, in accordance with sect. \$262 of title XXXV of the Revised Statutes of the United States, unless the commissioner authorized the collector to necept the bond of the leases in lieu of such written consent. The leases was prevented from running the distillery and the property remained idle. In an action by the leases to recover the rest of the premises, it was Hold, 1st. That the refusal of the leases to give his written consent to the leases, as required by law, to enable him to carry on the business for which the premises were leased, discharged the leaves from all obligation to pay the rest—the default of the leaver in this pair.

tionier amounting to "constructive eviction," so far so the legitimate employment of the property was concerned. 2d. That the obligation of the leaser to give his consent, as required by the law, was to be implied as a necessary incident to the lease, as fully as if there had been inserted a positive stipulation to that effect: Grabenhorst v. Nicodemus, 42 Md.

LEASE

Joint Occupancy—Claim for Rent not Assignable as between mere Joint Occupancy—Under an agreement for the mere joint occupancy of premiess and joint-conduct of business, there can be no claim for rent assignable by one of the parties as against the other. The remedy for a breach of the contract would be an action for damages, and not one for use and occupation: Curver v. Pulmer, S. C. Mich.

LIMITATIONS, STATUTE OF.

Application of Payments.—Kill gave Moore ten notes, one payable each concentive year without interest; judgment was entered on them; at the same time ten plain notes were given for the interest, payable yearly. Kill made payments to Moore from time to time; neither party made any appropriation of those payments to either debt. More than six years after the interest-notes were due, in a soire facine on the judgment, the court charged, "as the interest-notes are now berred by the statute, these payments must be applied to the debt in controversy." Held to be error: Moore v. Kill et al., 78 Penna.

MALICIOUS PROSECUTION.

Evidence—Province of Court and Jury—When Court not required, as more moto, to define Malice.—In an action for a malicious prosecution, the plaintiff offered to prove that pursuant to the regular custom of the detective police against department, his name was entered upon the detective police against of the city of Baktimore, and open to the impretion and use of the police force, as tending to show the publicity of the charge made against him and the consequent injury to him. If that this was clearly not admissible evidence against the defendant, unless there was some-law requiring such a record to he kept, or unless the plaintiff was propared to show by proof that the defendant knew that the name of the plaintiff would be so entered as the consequence of the charge of short brought against him: Garrey v. Wayson, 42 Md.

A prayer which asks the court to instruct the jury that malice "in its legal sease, is any wrongful act done intentionally without legal justification or excuse," is errouses: 1st. Because malice is not an act but the arrangful motion that prompts the act. 2d. Because what countitates a legal justification or excuse is matter of law to be determined by the court, and no prayer should be granted which submits such a question

to the jury: Id.

Where a prayer groups together various facts and asks the court to just use the jury that they may consider said facts, if found by them, in determining whether or not the defendant was actuated by malice, and several of the facts so consecrated, even if found by the jury, would not be evidence of malice, such prayer should be rejected: Id.

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Where the court has rejected a prayer defining malice because it was incorrect, it is not bound as more more to give any definition of it: Id.

MORTGAGE.

Taking Second Mortgage for same Debt.—Where a mortgage was given to a guardian to seeme a debt due his words, and subsequently a new guardian was appointed in his place, who, in ignorance of the existence of subsequent ensumbrances upon the property, agreed that the time of payment of the mortgage-debt should be extended, and took a new mortgage on the same property to secure its payment, but without releasing the first mortgage, it was Ilcirl, that the debt secured by the two mortgages was the same and should have the benefit of the lieu of the first mortgage: Drury et u.s. v. Brissoc, 42 Md.

MUNICIPAL CORPOLATION.

Jurisdiction in Equity— Violation of Ordinance—Nulsance.—Courte of chancery have no jurisdiction to restrain the threatened violation of a municipal ordinance unless the act amounts to a nuisance: Village of Mr. Jahne v. McFerlan, B. C. Mich.

The erection of a wooden building within municipal fre-limits is not of itself a nuisance, nor does the fact that it is prohibited by an ordinance make it so: Id.

NEGLIGENCE. See Admirally.

Railrond Whistle—When Negligence, is for the Court,—Negligence is the absence of care, according to the circumstances: Philadelphia, Wilmington and Baltimore Railroad Co. v. Stinger, 78 Penus.

It is the duty of an engineer approaching a highway, if danger is to be apprehended, to give warning by sounding the whicele, or other sufficient alarm; the failure to do so is negligence per as, to be determined by the court: Id.

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A wanton, unnecessary sounding of the whistle is negligence: M.

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A train was passing through a city on a railroad which had a number of short curves, so that persons enaid see the train but for a short distance; it was crossed by several streets and passed ever a river on a drawbridge; the rule of the company required that the whistic about to sounded about a certain point, to worm the bridge tender and persons

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shout to cross at other streets. IIdd, the use of the whistle at that

point in the ordinary manner was not negligence: Id.

If the whistle had not been sounded at such point and one had been befored by resson of the omission, it would have been negligence per se:

One driving an unbroken or vicious horse, or one easily frightened by a lessentive, along a public road running side by side with a rail-road, does so at his own peril; the right of the company to move their trains on their read is as high as that of the individual to use the public read: Idl.

NUISANCE. See Municipal Corporation.

PLEADING. See Estoppel.

RAILBOAD. See Negligenee.

REPLEVIN.

Prior Demand—Chattel Mortgage—Ilusband and Wife—Evidence.—A husband gave a chattel mortgage upon a span of horses in use on his wife's form, and abscouded. The mortgages, without making any demand for them, replevied them for breach of the condition of the mortgage. Held, that the mere presence of the horses on the farm did not make the wife a wrongdoor, and that the mortgages was at least bound to present his claim to her, to be recognised or rejected, before he could lawfully subject her to the costs of a suit: Campbell v. Quashenbush, S. C. Mich.

In replevin brought against a wife upon a liability incurred by her husband, who had abeconded, testimony of what the husband had said and done was inadmissible, nuless the acts or statements had been in

her presence or with her knowledge: Id.

SURETY. See Treser.

TROYER.

. Surety—Effect of Recovery in Tracer on Title to Goods—Joint Conversion—Damages.—The relation of suretychip is based on the consent of all the parties: Kenyon v. Woodref, S. U. Mich.

A recovery for conversion terminates the right to reclaim the pre-

porty converted: M.

Where parties are jointly guilty of conversion, and judgment has been recovered against one of them therefor, the injured party, by proceeding to enforce collection against him under that judgment, elects to look to him alone and bern himself from having recourse to the rest:

Al.

A deputy sheriff was descived by certain persons into converting property for their benefit. Judgment was recovered against him for the conversion, and ho, in term, sucing them in tert for the damage encod him by their fraud, recovered the amount of the judgment of this was hold a proper measure of damage: Al.

AMERICAN LAW REGISTER.

JULY 1876.

BOOKS OF PRACTICE.

LORD CORE we believe it was who said, "to be a good common lawyer, it is necessary to be a good prothonotary." Although the converse of the proposition cannot be pronounced equally true, yet it may confidently be asserted that to the successful practice of the law (understanding "practice" in its technical sense of directing the machinery of justice, rather than determining its principles), other things being equal, the good prothonotary will have a great advantage over his less practically instructed rivals.

Readiness in the actual practice of the law is, as a rule, among the latest acquisitions of the thorough student. Of two young men of equal advantages, of whom one is put to a systematic course of reading for three years, the other placed in the office of a lawyer of large miscellaneous business in the courts, or as an assistant in the prothonotary's office, where the greater part of his time will be taken up with the details of business, the more capable at the end of the three years to conduct the routine business of the law, will be the man who has studied least, and who is probably least acquainted with the theory and principles of jurispradence.

Now, to put the real student as nearly as possible on an equality in this respect with the man who learns by doing, has been one of the difficult problems legal educators have had to deal with.

The devotion of a certain portion of time to the consideration Yes XXIV.—49 (200)

of the various causes of action, on a plan akin to that of the best Nisi Prius writers, has been thought by many to afford the best method, short of the engrossing attention to details, of acquiring a knowledge of what is called Practice. If to study so conducted can be added participation in the exercise of a well-ordered Moot Court. all is clone it would seem which can be clone to make the student's practical and theoretical knowledge run well together. will be made to blend harmoniously, if, during the latter part of the student's course, or, better still, after the course of study is comploted, he gives himself heartily to the drudgery of paper-drawing (and in this should be included filling up of writs, orders, decrees and executions, as well as pleadings), in cases which are really pending, thus forcing upon him the importance of accuracy in detail, which only the consciousness that a real thing is being done This will be most satisfactorily accomplished in an office in which a well-established miscellaneous business is conducted. By a moderate use of his opportunities for observation, the Joung man so placed will soon find that very few men carry all the requisite knowledge in their heads, or all the requisite forms on the tip of their tongues or at their fingers' ends. He will roon learn that the professional man of large business, and also the Nisi Prius judge, both of whom are constantly called upon at the shortest notice to pass upon all sorts of questions, involving as well the principles applicable to the questions in hand as the proper mode of enforcing er defeating them; and the judge of the higher tribunal, who is called upon to review the action of the lawyer, and the view of that action taken by the judge of the inferior court, all alike feel constantly the need of instant information of the principles and acquaintance with the precedents applicable to such cases. The great desideratum for the lawyer, or the judge whose time is fully occupied. by business pressing for instant action, is a work, call it on "practice" or what you will, which puts all the views, learning and modes of action of his predecessors before him in a manner at once brief, comprehensive and intelligible, so that the disciplined mind may at a glance determine how far the doubt which suggests itself has been already considered, and if not, what guide settled principles afford for its solution. Such a treatise will be equally valuable to the intelli-A number of legal writers have tried their handsessayed to supply this want—some in a wider, some in a narrower field, upon whose labors time has set different estimates.

of these works are well known to the profession, and they have all their uses. As a general rule the subjects treated are not handled in an attractive way, and so the works fall almost exclusively into the category of reference books, and from their great accuracy and learning, command great attention, if not implicit obedience from the practitioner; while to the student they are frequently found to be useless, not to say repulsive. The dry bones seem as if they could have no connection with any thing which ever had or could have had life and action in it. In others, the topics are treated in a life-like way, and with enough of literary art to make them attractive to the student. Among the latter class may be included the very valuable work, in seven volumes, of Conway Robinson, of Richmond, Virginia, upon which have literally been bestowed the lucubrationes viginti annorum. The work is a condensed library, much more complete and full than the title-pages to the respective volumes, now numbering seven, would lead one to suppose.

The first volume, entitled "The Practice of Courts of Justice in England and the United States," appeared in 1854, and was concerned with "the place and time of a transaction or proceeding, treating chiefly of the conflict of laws, and the Statute of Limitations."

The second volume, with the same title, appeared in 1855, and treated "of the subject-matter of personal actions; in other words, of the right of action."

The third volume appeared in 1858, and treated of "personal actions with respect to the parties who may sue and be sued; the form of action; and the form of the pleadings."

The fourth volume appeared in 1860, and treated of "pleadings in personal actions, particularly of declarations, and giving forms thereof."

The fifth volume appeared in 1868, and treated of "the grounds and form of defence in personal actions."

The sixth volume appeared in 1870, the title being changed to "The Principles and Practice of Courts of Justice in England and the United States," and treated "further as to the grounds and form of defence in personal actions."

The seventh volume appeared in 1874, with the same title as the lixth volume, and treated "further in personal actions, as to the grounds and form of defence, and the answer to that defence." There is room, therefore, for several additional volumes in the consideration of real actions, and the defences to them, which, if the life of the author is spared, will probably appear in the future.

By a fire which occurred in Richmond in 1865, a large number of the first four volumes were destroyed. That part of the work, therefore, is not readily to be had. Of the whole work it may be fairly said that it contains a mass of accurately digested learning, which may well astonish the student by the revelation it makes of labor necessarily expended, and the access to rare material which it displays; while of the fifth, sixth and seventh volumes, treating of defences in personal actions, it may be said, in the words of Mr. Robinson himself, in the preface to the seventh volume, "they constitute, independently of any which precede them, a treaties complete, believed to be more complete than any other (as to such defences) yet published on either side of the Atlantic."

In a letter to the author (printed on page 1096 of the seventh volume), from the late Sir James Shaw Willes, one of the judges of the Court of Common Pleas, dated the 1st day of January 1856, and speaking of the first volume of Robinson's Practice, he says:

"Having devoted some of the Christmas vacation to its perusal, I do not know which most to admire and wonder at, the extraordinary industry with which you have collected materials from sources so numerous and so widely scattered, even to the citation of authorities still damp from the English press; the luminous exhibition in so condensed a form of the leading principles of decisions, side by side with the most striking instances of their application, giving to a subject, generally treated so as to be repulsive, a scientific interest; or the singularly felicitous arrangement, giving the clue at once to every part of the subject, and every point within its scope."

The work most nearly resembling Mr. Robinson's, in the comprehensiveness of its plan, is Chisty's General Practice, which must ever remain a monument of the industry and learning of its accomplished author. In many respects it is not as complete as the production of Mr. Robinson, and for the use of the American lawyer lacks the intimate knowledge of the turn the law has taken in the different states, constituting, to the American, so marked and valuable a feature of Mr. Robinson's book, and supplementing "the great amount of legal information, both ancient and modern, on so many different subjects," which Sir Grones Hayes

late one of the judges of the Queen's Bench, in a letter to the author, declared so remarkable.

The "home unius libri" is proverbially a dangerous antagonist, and so in another sense he may prove a most valuable friend and ally. One test to which the writer has put Mr. Robinson's work has been on the suggestion of any difficulty to apply to his pages for the solution, and almost invariably the work has answered his appeal, either by solving the difficulty or showing him that the question is yet an open one among the learned, and introducing him to all that is important which has been said on the subject.

To the advanced student, and to the man actively engaged in the administration of the law, this work of Mr. Robinson's seems alike invaluable; a copy of it in many country towns, where well-selected libraries are rare, would be invaluable. It is to be hoped the learned author may live to complete that which has evidently been with him a labor of love. However that may be, in what has been accomplished, the author has already paid handsomely the debt which every lawyer is said to owe to his profession. To that profession we cordially recommend the book.

P. P. M.

RECENT AMERICAN DECISIONS.

Court of Appeals of Kentucky.

JOHN W. KIMBROUGH, APPELLANT, D. GEORGE LANE ET AL.,
APPELLERS.

A rentract having for its consideration an agreement to suppress a criminal prosecution is void.

It is equally so, if any part of the consideration was the suppression of the presecution, and whether the contract was induced by premises or threats on one side or the other.

It is not necessary that the promise should be made at the same time as the contract; it is sufficient if it was made prior thereto, and was acted upon as a part of the consideration or inducement.

Nor does it make any difference that a prosecution is already commenced and it in the hands and under the control of the Commonwealth's officer, if the private prosecutor, as consideration for the contract, promises to abandon his sun offices in the course of justice. The particular interest of the party injured, in bringing the offender to justice, is one of the securities of the public in the enforcement of the laws, and any agreement by which this interest is turned against the Commonwealth is vaid.

This was a suit in equity, brought by appellant in the Beth Circuit Court are installed Court Tone and M. C.

on a note for \$3000, executed by them to him September 18th 1872, which recites that it was given in consideration of a note due by Lane & Brothers to the appellant for \$8600, from which they had been discharged in bankruptcy.

He also sought to forcolose a mortgage upon sixty-seven and a half acres of land, given by Owings to secure the payment of the note, and J. A. J. Lee having purchased the land, was made a defendant.

The defendants answered in substance that George Lane, for himself and brothers, purchased and received of the plaintiff a number . of mules, for which a note was executed to and accepted by him; that afterward the plaintiff came to the said George and expressed some uncasiness as to the sufficiency of the note, and prevailed on the said George to execute to him a mortgage on a tract of land to secure the debt; that about March 1872, the plaintiff was foreman of the grand jury of Harrison county, and induced said grand jury to find and present an indictment against said George for obtaining the mules by false pretences; that he was arrested, and while in attendance at the Harrison Circuit Court for trial on said charge, "the plaintiff proposed and agreed to and with said George that if he would pay or secure to him \$3000 he would have the criminal prosecution aforesaid dismissed, and that he would not appear as a witness against him. He and his wife were the prosecuting witnesses, and the defendants say in consideration that the plaintiff would procure the dismissal of said prosecution, the bond sued on was executed, and the plaintiff did thereupon, in consideration thereof, abandon the presecution and procured its dismissal. The mortgage was executed by defendant Owings at the same time and for no other consideration."

The cause subsequently came into the Bath County Court of Common Pleas, where a trial was had, which resulted in a judgment dismissing the petition, and this appeal is presecuted to reverse that judgment.

A. Duvel, Nesbitt & Guigell and Wm. H. Helt, for appellant,

Apperson & Reid and Reid & Stone, for appelless.

The opinion of the court was delivered by

Corez, J.—It is an old and well-settled rule of the common law that contracts having for their consideration an agreement to stifle

a criminal prosecution are void, because they are against the policy of the law, which will not permit an injury to the public to be made the subject of private agreements whereby the redress of the public wrong may be hindered or defeated. And it is equally well settled that if any part, however small, of the entire consideration of a contract be vicious, the whole contract is void.

Every citizen is under an obligation to the public to abstain from voluntarily placing himself in a position in which it is to his pecuniary interest to suppress, stifle or impede a public prosecution. "The Commonwealth has a right to rely upon the individual who has received special injury from the commission of a public offence, as the special instrument for its accertainment and punishment in the due course of law."

"The particular interest which he may be supposed to feel in bringing the offender to justice is one of the securities on which the public relies, and has a right to rely, for the enforcement of the laws and its own safety, and an agreement by which this interest is turned against the Commonwealth is in violation of her rights and policy:" Gardner v. Maxey, 9 B. Mon. 90; Swan, &c., v. Chandler & Phillips, 8 Id 98.

That such is the law was conceded in the argument, but it was insisted that the evidence did not show that such an agreement as that set forth in the answer was made. George Lane and Owings both testified directly and positively that an agreement in substance the same as that set forth in the answer was made. This, however, is contradicted by the appellant and two other persons present at the time the agreement to execute the note and mortgage was finally entered into, who say that the appellant then distinctly said that he could not make any arrangement with Lane by which he would agree to have the indictment dismissed, or fail to appear as a witness against him; that the case was in the hands of the Commonwealth, and would have to be disposed of by the court; that he could in no way control the prosecution, and would not undertake to do so.

The appellant awere that he did not speak to the Common-wealth's atterney on the subject of dismissing the indistment, and the atterney awere that he dismissed it because, after talking with the witnesses, he was satisfied he could not make out a case. If this was all the evidence in the record upon the subject, we should incline to the opinion that the agreement set forth in the answer

was not established by the evidence; but there are other important facts which, although they do not prove that there was an express agreement made at the time the note and mortgage were given, prove that appellant and Lane and Owings then understood that the prosecution would be abandoned if the sum of \$8000 was secured to the appellant, and that the execution of these securities was the condition on which he would not only refrain from a vigorous prosecution through counsel employed by him for that purpose, but would abandon all efforts to bring Lane to trial.

The prosecution was called September 16th 1872, and set for trial on the 18th of that month, and attachments were awarded against absent witnesses for the Commonwealth. On the 18th, after the case was called for trial, the appellant and his counsel employed to aid in the prosecution, retired with Lane and Owings, and one of the Commonwealth's witnesses, to a consulting-room in the courthouse, and there, while the question of proceeding with the trial was before the court, and when, for aught that appears, the Commonwealth was ready to proceed with the trial, the appellant entered into, or rather renewed, negotiations with Lanc for securing a part of his debt, from which, according to the recital in the note then given, Lane had been discharged in bankruptcy. Owings proved, without contradiction by any one, that during this interview the appellant desired him (Owings) to mortgage his land to secure the sum of \$3000; that he was unwilling to do so, but offered to give him personal security, which he refused to accept; that the appellant then rose from his seat and said that "that was the last damned proposition he intended to make; that he had Bath county money to prosecute George Lane with;" and thereupon Owings agreed to execute the mortgage, and did so.

Appellant agreed, if this was done, to discharge the attorney he had employed to aid in the prosecution, and immediately did so; and he also promised that if Lane was brought to trial on the indistment he would surrender the note and mortgage.

Some of the Commonwealth's witnesses, against whom attachments were awarded on the 16th, and who were present on the 16th, returned home that day, and no further action seems to have been taken in the case until September 24th 1874, when, on motion of the attorney for the Commonwealth, the indictment was dismissed.

Owings's deposition was taken in December 1878, and he proved

that prior to the execution of the note and mortgage, the appellant said to Lane that, for \$2500 in cash, or \$2000 on time, he would dismiss the prespection.

This proposition, he says, was not made in his presence, but Lone and appellant were in a room together and sent for him, and appellant them toki him what proposition he had made. The appellant gave his deposition in March 1874, but failed to contradict Owings's statement. After the date of the note and mortgage, and before the indictment was dismissed, appellant wrote to Lone as failows:—

"I think I am fully satisfied that you are co-operating with parties to put me to some trouble to secure the money on the note I hold against you. All I have to say to you is this: I was taken out by several persons the day I was in Owingsville, and an effort made to get from me comething to commit you in your county. I evaded all questions. You know what I promised you, but that promise depends upon your action in this matter. If anything is gotten hold of against you in Bath county you will find things hetter than you have any idea of at this time. Everything depends upon, not what you can do to refute, but to advance this matter to a final settlement."

These facts leave no room to doubt that, at the time the note and marigage were given, it was understood by all parties present that the presenting would end, so far as appoilant was concerned, as soon as the required security was given, and it is equally clear that it was likewise understood that, unless they were given, the ease would go on as far as it was in his power to easy it on.

Why declare that he had made his last proposition, and that he had maney to earry on the prosecution, if he did not mean to be understood as intending to earry it on, if his demand was not associated to, and to abandon it if his dobt was secured?

If he had made no promise, express or implied, to abandon the processtion, to what promise did he refer in his letter? If the further procession was not to be abandoned, why not proceed with it in Reptember 1878, when, as for as appears, the Commonwealth was ready to go on with it?

Considerable stress is laid by his councel upon the declaration proved to have been made by the appellant at the interview, which respited in the execution of the note and mortgage, that he could not make any arrangement by which he would undertake to have

the indictment dismissed, and that he would not fail or refuse to testify if called for that purpose; that the case was in the hands of the Commonwealth, and would have to be disposed of by the court.

If this evidence stood alone in the record it might be entitled to some consideration, but when viewed in connection with his former offer to dismiss the indictment for \$2500 in cash, or \$3000 on time, and his declaration at the time when the negetiation was closed that he had made his last proposition, and had money to prosecute Lane with, his agreement to surrender the note and mortgage if the prosecution went on; the fact that from that moment it seems to have been wholly abandoned, and the reference in his letter to Lane to the promise he had made, and his covert threat, if Lane did not keep the promise made by him, we do not regard the declaration that he did not intend to bind himself to interfere between Lane and the Commonwealth as furnishing any evidence whatever that he did not make the promise imputed to him in the answer.

It is not necessary that the promise should have been made at the very moment, or even on the same day, of the execution of the writings; it is enough if it appears that such a promise was made at that time or prior thereto, and that all parties acted in view of that promise, or that it was the inducement which operated upon the minds of the obligors.

The appellant was the person alleged to have been injured by the act for which Lane was indicted, and the public had a right to rely upon the interest which he would naturally feel in having him brought to punishment in due course of law, and has a right to complain of a contract, the direct natural effect of which was to turn . that interest against the Commonwealth. Such contracts are highly reprehensible when made by one having no other relation to a procedution than that of being the person injured by the public esonce, but when, in addition to being the party specially aggricated, he is also connected with the origin of the prosecution by having been a member of the grand jury by which the indictment was found, the courts should scan the transaction with jealous vigilance in order to avoid being made the instruments of oppression in the hands of those who, for vengeance or profit, may seek through public prosecution to extort money to which they are not legally autitled so for the resovery of which sivil process affords them the

remedy, and for the further purpose of guarding the instrumentalities provided by law for the detection and punishment of crime from corruption.

No citizen can be put upon trial for an infamous crime, except upon the indictment of a grand jury. This has been thought so valuable a safeguard to individuals as to deserve a place in the Bill of Rights in our Constitution. But it will prove a snare instead of a protection if a member of a grand jury, conceiving himself to have been the victim of a felony, may, by his own testimony, and, if need be, his own vote and personal influence with his fellow grand jurors, procure an indictment against the supposed criminal, and then by threats of a vigorous prosecution if his private grievance is not redressed, and promises express or implied that he will forbear if they are complied with, obtain an enforcible contract for his own indemnity.

Where a person injured by a criminal act was himself a member of the grand jury by which the alleged offender was indicted, and the aggrieved person enters into negotiations with the accused for his own indomnity for losses resulting from the criminal act, and the prosecution is suddenly abandoned, especially after threats that it will be carried on vigorously unless indomnity be made, it will require but slight evidence to satisfy the court, not only that there was an agreement to compound the offence, but that the prosecution was set on foot to bring the accused and his friends to terms.

It is urged by some of appellant's counsel that as Lee purchased the land mortgaged by Owings, subject to the mortgage, and he will be so much the gainer if the appellant fails in his efforts to foreclose, while Owings and Lane will gain nothing, this eaght to have some weight with the court in deciding the question.

It is sufficient to say on this point that the rule of law inhibiting such contracts was not made for the benefit of the obligors in the illegal contract. They stand in no better position in the eyes of the law than the obligees.

The courts will not enforce such contracts, because they are levelled at the safety and repose of society, and are calculated to shield the guilty from punishment and leave them free to prey upon the public. If money is paid upon such a contract, the courts will not aid in recovering it back; they will leave both parties in the exact position in which they have placed themselves.

conclusion from the facts, his judgment is right and must be affirmed.

The foregoing opinion discusses a question of great practical importance, in regard to which we fear the law of this country is by no means up to the standard of the English common law, either in principle or administration. The rule in the English courts is very extensively discussed in Wells v. Abrofirms, Law Rep. 7 Q. B. 884, in regard to the right of any civil remedy, and what remedy, the party aggrieved by a folcoious act, which also involves an infraction of private right, may demand in a court of justice.

It mems to have been intimated in some of the early English cases, that the civil remedy, or right of action, is merged in the felony: lliggies v. Batcher, Yelv. 89; Dombre v. Corne gh, Reples 306; B. Mackers V. Mi br., 4 Term Rep. 220-232; Cra by v. Long. 12 Rost 4.39. In the latter case the was held only to be suspended till the defendent was convicted or acquitted of the criminal charge without consirence. But later cases treat the civil rightof action as merely suspended until the offender shall be convicted: Wel'ock v. Constantine, 2 Huriet. & Colt. 146; Gimes v. Weerfall, 2 C. & P. 41; White v. Sportigue, 13 M. & W. 603. And the rule does not apply to one who waived the right innocently.

In the case of Welle v. Abrahams, sepre, it is agreed by all the judges, that, although the felon cannot plead his own crime either in her or suspension of the civil remaily, as held in Lattrall v. Aryaell, 1 Med. 202, yet that if the felony appear either upon the declaration or evidence, it is competent in some proper unde to stay proceedings in the civil action, until the felon shall be unwieted. Bome of the cases go the 'ragth of helding that in such case it is duty of the court to interfere see pasts and stay the civil action: Gimen

v. Woodfall, supra; Wellock v. Construtine, supra. But this doctrine has been repudiated: White v. Spatigue, supra; Wells v. Abraham, supra. But the latter case distinctly recognises the rule of law that the civil remody is suspended during the prosecution for felony and cannot be pressed until that has been terminated either by conviction or sequittal without plaintiff's consivence: Creeky v. Long, supra.

But we are not aware that this rule has ever been enforced to any great extent, if at all, in this country: Metcalf's note 2 to Higgins v. Butcher, Yelv. 89. But the rule of the common law, that all contracts for compounding or stilling prosecutions for felony are illegal and vold, in maintained here to the fullest extent. The compounding of felony or stifling prosecutions therefor, is also indictable as a mistemeanor in most of the American states, either by special statute or by force of common law. It has often been intimated in English cases that this rule did not extend to mere misdemeanors, and that parties interested in such prosecutions might lawfally compound them: Elworthy v. Bird, 9 Moore 230; 2 Blag. 258 ; Draga v. Rortsons, 2 Kap. 643 ; Ellernonenou, Ch. J., in Taglor v. Leadey, 9 East 49. But this rule is enafined, we believe, to prosecutions for offences where the party aggricved is principally concerned, and where the compromise is effected under the advice of the court, by virtue of the English statute 18 Eliz., e. 5, s. S. For in Collins v. Blantern, 2 Wilson 341, 1 Smith's In C. 489, the question how far the contract for stifling or compounding a prosecution for perjuty, which is only a misdemeaner in England, and securities given in furtherance of such compromise, may be enforced in the courts, was greatly dissecond, and it was clearly held, that no action can be maintained upon any such contract where any part of the consideration arises from such compromise, thus making no distinction between felant and other affences of similar enormity.

We have examined the facts upon which the exert deny the epildity of the contract in the principal case, and it seems to be the decision is based upon ment actionatory grounds; for the contract seems to have had no other con-

deferation but the compressive or aboudemonst of the presention against the defendant, and was expressly agreed to be corrected if the defendant were brought to trial. There would seem, then, to be no ground to argue that the contract did not rest exclusively upon the abandonment of the original preseration, which, though not for a follow, was an affence of the same public charactor and of great exercit terpitads.

L. F. B.

Superior Court of New Mampohire.

PERRY of AL O. CITY OF KEENE.

The laying of taxes is a legislative function, and the policy and expediency of it, so well so its emount, are questions exclusively for that department of the state.

There is no abstract legal principle by which to determine whether a use to public; a neart must decide it as a consignion of fact and public policy, to the same manner as the legislature. Hence, while it is clearly the daty of a court to determine finally what is a public purpose, it will only decide adversely to the judgment of the legislature in a clear case.

If a perpose is public, it makes no difference that the agent by whom it is to be exceed out is a private individual or corporation.

The building of a reffrance is a public purpose; and a statute authorizing a town to rote money to aid in such purpose, even though the money is to be given as a gratuity and not as a subscription to stock, is not unconstitutional as a taking of private property for a private use.

Term was a bill in equity, by cortain tax-payors in Koone, praying for an injunction to restrain the defendants from issuing bands, &c., in aid of the construction of the Manchester and Koone Railroad, in pursuance of a vote of the city councils to that and. The facts are stated in the opinion.

Surgest & Chaos and Hardy, for the plaintiffs.

Lane, Josepher and Burne, for the defendants.

LADD, J.—"Any town may, by a two-thirds rote, raise, by tax or loon, such same of money as they shall doom expedient, not exceeding five per cent. of the valuation thereof, " " and appropriate the same to aid in the construction of any relired in this state in each manner as they shall become account? The F.

ch. 84, § 16. In accordance with the provisions of this statute, the inhabitants of the city of Keene have voted a subsidy equal to three per cent. of their last property valuation, to aid in the construction of that part of the Manchester and Keene Railroad located between Greenfield and Keene. This sum, amounting to upwards of \$180,000, is called a "gratuity" in the vote. It is, in fact, an appropriation of that amount, to be raised by a public tax, to the purpose of building a railroad, with no equivalent, except the expected benefits to be derived from the opening of such railroad. The plaintiffs, who are citisens and large tax-payers in Keene, contend that the legislature, in passing the act quoted above, transcended the limits of their constitutional power; that the action of the city in voting the gratuity is therefore without warrant of law, and they ask for an injunction to prevent the issuing of bonds or the levy of taxes in accordance with said vote.

The question we are thus called upon to consider is an important one, not only in its legal aspects, but in its practical bearing upon the rights and interests of these parties, as well as others in a similar situation, both tax-payers and holders of municipal bonds heretofore issued for a like purpose under the authority of the act in question.

In one view, the duty of the court is extremely plain and simple; in another, it is delicate and not free from difficulty. We have not to inquire into the policy of the law or (if the purpose be admitted to be public) whether the supposed public good to be attained was sufficient to justify the legislature in conferring upon two-thirds of the legal voters of a town the power to devote, not only their own property, but that of the unwilling other third, to such a purpose. All mere questions of expediency, and all questions respecting the just operation of the law, within the limits prescribed by the constitution, were settled by the legislature when it was enacted. The court have only to place the statute and the constitution side by side, and say whether there is such a conflict between the two that they cannot stand together. If, upon such examination, there appears to be a conflict, and if the conflict is so clear and palpable as to leave no reasonable doubt that the legislature have undertaken to do what they were prohibited from doing by the constitution, the court cannot avoid the high, though unwelcome, duty of declaring the statute inoperative, because the constitution and not the statute is the paramount law, and the court must interpret and administer all the laws alike.

The learned counsel for the plaintiffs have not pointed out the particular part or clause of the constitution which they say is violated by this statute. Their position, however, is that the act authorizes the taking of private property under the name and guise of taxation, and appropriating it to a use that is really and essentially private; and that such a proceeding, being manifestly at war with those fundamental principles upon which the right of the citizen to be secure in the possession and enjoyment of his property depends, is in violation of all those provisions in the constitution established to guard and perpetuate that right.

The proposition assumes this form: The legislature are forbidden by the constitution to exact money from the people of the state under the name of taxes and apply it to a private purpose; this statute authorises the act thus forbidden, and is therefore void. The first part of this proposition is admitted by the defendanta, and so we need not now inquire in what particular provision of the constitution the inhibition is to be found. Whether it rests upon the commonly received meaning and definition of the terms: taxes. rates, assessments, &c., used in the constitution, and the general guaranties of private property contained in the Bill of Rights, or whether, by a fair construction of art. 5, the levying of all taxes, municipal as well as state, is limited to the purposes therein named. vis., for the public service, in the necessary defence and support , of the government of this state, and the protection and preservation of the subjects thereof, is at present immaterial, inaccured as we are to start with the assumption that taxes cannot be imposed or authorized by the legislature for any other than a public DETPOSO.

Is the building of a railroad a public purpose? The legislature have undoubtedly passed their judgment on that question, and determined that it is. It is not to be denied that the levying of taxes is specially and entirely a legislative function, and the court are not to encroach upon the province of a co-ordinate branch of the government in the exercise of that power. Where is the line that divides the province of the court from that of the legislature in a matter of this sort? The court is to expound and administer the laws, and there the judicial function and duty ends. How much of the question, whether a given object is public, lies within the province of the law, and how much in the domain of political science and statesmanship? When the judge has declared all the

law that onters into the problem, how much is still lest for the iletermination of the legislature? Admitting, as has, indeed, been . more than intimated in this state (Concord Railroad v. Greeley, 17 N. H. 57), that it is for the court finally to determine whether the use is public, what is the criterion—what are the rules which the law furnishes to the court, wherewith to eliminate a true answer to the inquiry? In what respect does the question as presented to the court, differ from the same question as presented to the legislature? If the court stop, when they reach the borders of legislative ground, how far can they proceed? If the legislature should take the property of A., or the property of all the tax-payers in the town of A., and hand it over without consideration, without pretence of any public obligation or duty to B., to be used by him in buying a farm, or building a house, or setting himself up in business, the case would be so clear, that the common sense of every one would at once say the limits of legislation have been overstopped, by a taking of private property and devoting it to a private use. That is the broad ground upon which such cases as Allen v. Jey, 12 Am. Law Reg. N. S. 481, s. c. 60 Me. 124; Lowell v. Boston, 111 Mass. 454; and The Citizen's Loan Association v. Topeka, Sup. Ct. U. S., were decided. And yet what rule of law do the courts find to aid thom in thus revising the judgment of the legislature? Is it not clear that the question they pass upon is the same question as that decided by the legislature, and that they must determine it in the same way the legislature have done, simply by the exercise of reason and judgment?

What is it that settles the character of a given purpose in respect of its being public or otherwise? It has been said that for the legislature to declare a use public, does not make it so (17 N. H. 57), and the same may certainly be said, with equal truth of a like declaration by the court. A judicial christening can no more affect the nature of the thing itself than a legislative christening. Judging a priori, and without some knowledge of the wants of mankind when organized in communities and states, I do not quite understand how it sould be predicated of any use that it is per se public: Dexon, C. J., in Whiting v. Shebeyen Railway Co., 9 Am. Law Reg. N. S. 161.

Of light, air, water, &c., the common bounties of providence, it might, indeed, be said beforehead that they are in a very bread sense public; but it is not of such uses that we are speaking.

Without knowledge of human nature, knowledge derived from experience and observation of what may be needful for the comfort, well being and prosperity of the people of a state advanced in civilization, and knowledge gained in the same way as to what necessary conditions of their welfare will be supplied by private enterprise, and what will go unsupplied without interference by the state, I do not see how any use could be said to be per se public, or how either a legislature or a court could form a judgment that would not be founded almost wholly upon theory and conjecture. No one doubts that the building and maintaining of our common highways is a public purpose. Why? Certainly for no other reason than that they furnish facilities for travel, the transmission of intelligence and the transportation of goods. But why should the state take this matter under its fostering care, imposing upon the people a very great yearly burden in the . shape of taxes for their support, any more than many others that might be mentioned of equal and perhaps greater importance to its citisens?

Is it of greater concern to the citizen that he should have a road to travel on when he desires to visit his neighbor in the next town, or transport the products of his farm or his factory to market and bring back the commodities for which they may be exchanged, than that he should have a mill to grind his corn, a tanner, a sheemaker and a tailor to manufacture his raw material into clothing wherewith his body may be covered? Doubtless highways are of great public benefit, without them I suppose the whole state would soon return to its primal condition of a hewling wildersess, fit only for the habitation of wild beasts and savages. How would it be if there were no mills for the manufactures of lumber, no joiners or masons to build houses, no manufacturers of cloth, no merchants or tradesmen to assist in the exchange of commodities?

These suppositions may appear somewhat fanciful, but they illustrate the inquiry. Why is the building of reads to be regarded as a public service, while many other things, equally necessary for the upholding of life, the security of property, the preservation of learning, morality and religion, are by common consent regarded as private, and so left to the private enterprise of the citizen? The answer to this question surely is not found in any abstract principle of law. It is essentially a conclusion of fact and public policy, the result of an inquiry into the individual necessities of

every member of the community, which in the aggregate show the character and urgency of the public need, and the likelihood that those pecessities will be supplied without interference from the state. Obviously it bears a far elemer resemblance to the deduction of a politician than the application of a legal principle by a judge. Should it be found by experience that no person in the state would, voluntarily and unaided, establish and carry on any given trade or calling, universally admitted to be necessary for the upholding of life, the preservation of health, the maintenance of deceney, order and civilization among the people, would not the cerrying on of such necessary trade or calling thereupon become a public purpose, for which the legislature might lawfully impose a tax? Experience shows that highways would not be built, or, if built, would not be located in the right places with reference to convenient transit between distant points, nor kept in suitable repair, but for the control assumed over the whole matter by the state; and so the state interferes and establishes a system, and imposes an enormous burden upon the people, in the shape of taxes, compelling them to supply themselves with what they certainly need, but need no more than they need shoes or bread, and nobody ever complained that the interference was unauthorized or the purpose other than a public one.

Enough has been said to show the delicate nature of the task imposed upon the court, when they are called upon to revise the judgment of the legislature in a matter of this description. especially delicate for two reasons; first, because the discretion of the legislature with respect to the whole subject of levying taxes is so very large, and their power so exclusive that it is not always easy to say when the limits of that discretion and power have been passed; and second, because the rule to be applied, is furnished, not so much by the law as by those general considerations of public pelicy and political economy, to which allusion has been made. I do not dony the power and duty of the court, when private rights of property are in question, to settle those rights according te a just interpretation of the constitution; and the discharge of that duty may involve a revision of the judgment of the legislature upon a question which, like this, partakes more or less of a political oberector.

But before the court can reverse the judgment of the legislature

and the executive, and declare a statute levying or authorising a tax to be inoperative and void, a very clear case must be shown.

After the legislature and the executive have both decided that the purpose for which a tax is laid, is public, nothing short of a moral certainty that a mistake has been made can, in my judgment, warrant the court in overruling that decision, especially when nothing better can be set up in its place than the naked opinion of the court as to the character of the use proposed.

Certainly it is not for the court to shrink from the discharge of a constitutional duty; but at the same time it is not for this branch of the government to set an example of encroachment apon the province of others. It is only the enunciation of a rule, that is now elementary in the American states, to say that, before we can declare this law unconstitutional we must be fully satisfied, satisfied beyond a reasonable doubt, that the purpose for which the tax is authorized is private and not public.

I have spoken incidentally of our common highways, and it has been said that their purpose is to furnish to the public facilities for travel, for the transmission of intelligence and the carrying of goods. No one will contend that to build and maintain them is not a public purpose. Indeed the public nature of this use is so very obvious that it has been classed among those said to be public per se (Whiting v. Sheboygan Railway Co., supra), standing in need of no credentials from the court to entitle it to legislative recognition. Wherein does the use of a railroad differ? What public benefit can be mentioned that comes from the building of a common road, which does not come, in kind, if not in degree, from the building of a railroad? It is not necessary to enlarge upon the benefits of either; they are doubtless numerous and varied, so numerous indeed, so interwoven with everything that distinguishes an intelligent, virtuous, rich, well organized and well governed state, from a tribe of primitive berbarians, that an attempt to trace them all would be little less than an attempt to search out the sources of our civilisation. The point is they are alike in kind, and when it is admitted that the construction of one class of reads, is clearly, beyond all possibility of doubt, a public purpose, I cannot conceive upon what ground it is to be said, that the construction of the other class, is beyond all reasonable doubt a private



PERRY BY AL. P. CITY OF KEENE.

are built and run for private gain; that the public can only enjoy the benefits offered by them, upon payment of a toll, and therefore the purpose is private. The short and conclusive answer to all this, in my mind, is that the character of the agency employed, does not and cannot determine the nature of the end to be secured. To say of a railroad corporation, that it is a private corporation, and therefore the construction of a railroad is a private purpose, seems to me, in truth, no more logical, if less abourd, than to say of any officer or agent of the state, he is an individual with all the private interests and private associations of other citizens, therefore the purpose of his office, and of all his official acts, is private. The argument that because a toll is granted, therefore the purpose must be private, carried to its logical results, would certainly declare the purpose of a very large number of public offices in the state to be private; among them the secretary of state, justices of the peace and of police courts, registers of probate, registers of deeds, sheriffs, clerks of the courts, town clerks, &c., &c. If the purpose is public, it makes no difference that the agent by whose hand it is to be attained is private, nor, if the purpose were private, would it make any difference that a public agent was employed. The question, therefore, whether a railroad corporation is to be regarded as public or private, or both, that is, public in one aspect and private in another, seems to me quite immaterial, and that the decision of that question one way or the other does not advance the inquiry we have in hand.

It has been admitted by some, who have maintained with singular ability and seal the position of the plaintiffs in this case, that the state might legally take into its own hands, the whole matter of railroads within its limits—might build, equip, operate and control them, making use of no intermediate agents in the business; because in that case, the people would remain owners of the property into which their money has been converted. With great deference, it seems to me, this is a concession of the very point in dispute. The form of the argument seems to be this: the state cannot levy a tax for a private purpose (so much all admit); the building of a railroad is a private purpose; but the state may nevertheless levy a tax to build a railroad, provided, the tax be large enough to earry through the whole enterprise without calling in the aid of any other agency.

' Or to draw from the same premises, the conclusion sought to be

established here; the state cannot levy a tax for a private purpose; the state may levy a tax to wholly build, equip and run a railroad; therefore, the building of a railroad is a private purpose. This does not bear examination.

Another argument may be noticed here. It has been said by courts whose decisions we are accustomed to regard with great respect, that, admitting the power of the legislature to authorize towns and cities to subscribe for stock in railread corporations and issue bends or levy taxes in payment thereof, it does not follow that they can lawfully authorise the direct appropriation of the public funds to aid in the construction of a railroad where no stock is taken; because in that event, no interest or ownership results to the town in the property of the corporation, and no voice in the control or management of its affairs is secured. I do not , understand how this can be said by a court of law. Upon what ground can the legislature authorise the raising of a tax to pay for stock in a corporation of any sort, unless the purchase of such stock will be a devotion of the public funds to a public service? It is a matter of common knewledge that the original stock in railroad corporations eften becomes worthless or nearly so; but whether such a result is to be apprehended or not makes no difference, as fur as I can see, with the argument. If the end in view is private and not public, the legislature might as well authorize a town to enter into copartnership with any private person in the procecution of any private enterprise or business, and furnish its stipulated proportion of the capital to be invested by levying a tax, as to authorize it to purchase such steck, even were it likely to advance in value on their hands, and the people thus be gainers by the operation. Deny that the end is public. and at the same time admit that a tax may he levied for the purchase of the stock, and the inevitable conclusion appears to be, that towns may be authorized to engage in the private and perileus business of dealing in stocks, and so apply the public fends to a purpose as remote as any that can well be conceived from that permitted by the constitution, to my nothing of the fact that such investment must be made with a resconable assurance that the money will be lost. Clearly, one or the other of these propositions must be changed; either we must admit that the and in view is public, or dony the power to purchase stocks when the end in view is morely a private eac.

It is said that the power to tax involves the power to destroy; and that this is true is well shown by the recent example of the state banks, whose existence was terminated by a tax of ten per cent., imposed by Congress on their circulation. But how does this strengthen the position of the plaintiffs? They say that if the legislature have the constitutional right and power to authorise a tax of three per cent. to aid this railroad, they have the constitutional right and power to levy a tax upon all the property in the city of Keene equal to the full value of such property, and give that to the same road. Suppose this be granted, what does it preve as to the object for which the tax is laid? Is it not equally true that they might authorize a tax equal to the full value of all the property in the city for the support of the public schools, the public highways, or any other object of a confessedly public nature? The suggestion is plainly of no force in an inquiry as to the nature of the purpose for which a tax has been authorized or levied, for the reason that the supposed power of destruction is a necessary incident of the taxing power, and follows it, whatever be the object for which it is put forth, whether public and legal, or private and illegal. It amounts to little more, in the present case, than the truism that any governmental power may be abused by the agent in whose hands it is reposed.

But, if the question on which this case must turn has been rightly apprehended, I think it was decided more than thirty years ago in the case of The Concord Railroad v. Greeley, 17 N. H. 47, where it was held that a railroad is in general such a public use as affords just ground for the taking of private property, and appropriating it to that use. A glance at the yearly legislation in this state with reference to the taking of land for railroads against the ewner's concent is sufficient, without looking elsewhere, to show that for several years before the case of Concord Railroad v. Greatey arose, much doubt was felt by the legislature and the people at large, as to the existence of such a right; and a strong disposition is manifest to deny its exercise. The first charters to railread corporations, granted the right to lay out their read, and necessarily to take land for that purpose. See Private Acts of 1885, pp. 201, 212, 228, 264; Private Acts of June session 1886, p. 341; Private Acts of 1887, p. 836; Private Acts of 1889, pp. 456, 470. At the June session of 1836, a general law was passed, entitled, an act to provide a more sheep and expeditions mode

of amossing damages for land or materials taken by railroad corporations, which unequivocally recognises the existence and validity of the right thus conferred by the charters: Public Acts, June session 1836, p. 299. This act was repealed at the November session of the same year, and an act substituted in place of it covering the same general ground, but more comprehensive and specific in its details, providing for an assessment of damages by jury in case the parties were not content with the award of the committee, &c.: Public Laws, November session 1836, p. 248. Approved January 18th 1887. It is noticeable also that at the Rovember session 1836, an act was passed (approved January 14th 1887), authorizing the town of Concord to purchase and held stock in the Concord Railroad corporation to an amount not exceeding \$30,000: Public Acts, November session 1836, p. 816.

But before 1840, for reasons that are well known, but need not be stated here, the public mind became somewhat agitated upon the general subject of the legal relations borne by railroad corporations to the people and government of the state, and the rights and duties of such corporations, and the power of the logislature to appropriate private property to their use, without the owner's consent. We accordingly find that at the June session of that year, an act of a somewhat sweeping character was passed, whereby the Acts of June 1886 and January 1887, in reference to the assessment of damages, and the act authorising Concord to purchase and hold stock in the Concord Railroad, were all expressly repealed. and it was further enacted, "that from and after the passage of this act, it shall not be lawful for any corporation to take, use or ecoupy any lands, without the consent of the ewner thereof, unless the construction of the work contemplated in the act of incorporation shall have been commenced prior to the passeage of this act:" Laws of June session 1840, ch. 496, p. 488. At the November session of the same year, another act was passed which, whether called forth by actual grievances or not, shows in a striking light the state of public sentiment and the temper of the legislature. It was exacted " that from and after the 16th day of March A. D. 1841, it shall be lawful for the owner or owners of any land taken by any railroad corporation, in the construction of their railroad, when such landowner shall not have been fully compensated for the same on or before the 15th day of March 1841, to remove the rails from said railroad, fonce up the land, and take and retain

possession of the same until entire satisfaction is made to the owner or owners of the land thus taken:" Laws of November, session 1840, p. 504. This latter act was repealed by the Revised Statutes which went into effect March 1st 1848, but the provision of the former, that no railroad corporation shall take any land for the use of said corporation without the consent of the owner thereof, was retained and appears as sect. 1 of ch. 142, R. S. Things remained in this position until 1844, when an act was passed, entitled "An Act to render railroad corporations public in certain cases, and constituting a board of railroad commissioners:" Laws of Nevember session 1844, ch. 128. Section 8th of this act contains an elaborate provision for a lease under the seal of the state, signed by the governor and certified by the secretary of state, whereby the right to construct a railroad ever the route proposed should be granted and guaranteed to the corporation for a term not less than one hundred, nor more than two hundred years, for the public use and benefit, with the right of user in the same, to pass and repass with their locomotives, cars and vehicles of transportation thereon, &c.—a device for finding the way out of a dilemma, which would not do discredit to the ingenious inventors of many of the legal actions with which the common law still abounds.

The next year (1845) came the case of Concord Railroad v. Greeley, where the constitutional power of the legislature to autherize the taking of private property for such a use was strenuously denied. It is obvious, even without going outside the statute just referred to for evidence, that this was a question which had estionely engaged the public mind, and one upon which opinions greatly differed. Under these circumstances it was natural that the case should receive a careful examination by the court; and I think it may justly be said that the opinion by Mr. Justice. Gil-CHRIST is among the most valuable to be found upon the general subject of which it treats. He says: "The constitution of this state is not so much a constitution delegating power, as a constitution regulating and restraining power. All power in the largest terms applicable to such a subject, is conferred by the people, through the constitution, upon the general court, subject to the condition in its exercise, that it shall pass no laws repugnant to the limitations and restrictions in the constitution." He considers the objection that the power of eminent domain cannot be exercised on pt taraugh the medium of a public corporation, and says the question involved is not what is a public, and what is a private corporation, but whether this corporation be one that may held the land of an individual for the public use.

In considering the great question in the case, namely, whether the proposed use was public, he says: "It is sufficient for this seession to say, that the use of a thing may be considered public, so far as to justify the exertion of the legislative prerogative in amestian, if it be devoted to the object of satisfying a reasonable pervading public demand, for the facilities for travel, for transmission of intelligence and of commodities, not extraordinary as compared with these enjoyed by communities of like pursuits. Bush objects rank themselves in fact among the first duties of a moveynment from the moment that it has secured itself against foreign aggression and established tranquillity within its own borders. Without these the citizen pines in seclusion. The bounties of nature and the fruits of his labor which commerce would transmute into wealth are wasted, and he provides himself with diffiegity, if at all, with those things which embellish home and render its appendiate enjoyments possible." I am not aware that the asundness of this spinion has been questioned; certainly is has heen acquienced in and acted upon by the legislature and the people, as the undoubted law of the state ever since it was rendered. The legislature has again and again, in a variety of forms, directly and indirectly, declared the use to be public, and has jealously guarded against the possibility of an informee that the right thus to take land, could be derived from any other source than the supreme law-making power of the state.

Railrands are declared to be designed for the public accommodation, like other highways, and therefore to be public; and it is said that being public highways, they can be laid out, built, maintained and put in operation only by virtue of grants of the legislature or of anthority derived from them. They are required, in times of war, insurrection or invasion, to transport soldiers, munitions of war and other property of the state, as well as soldiers, munitions of war and other property of the United States, and the mails of the United States, at such rates as the governor and conneil shall impose, if the parties do not agree. They are forbidden to discentinue their reads and required to keep them in good remain, and discharge their duties in corrying passangers and

freight agreeably to their proper object and purpose: Gen. Stats., chs. 145, 146. Besides, their charters are always carefully guarded to prevent an inference that they are not the creatures of the state, charged with public functions and subject to legislative control. Undoubtedly a legislative declaration that a given use is public cannot be regarded as conclusive to all intents without denying the power of the court to interpret the constitution; nevertheless, it is true that the creator of a thing may generally impose upon the work of his own hands such qualities and characteristics as be chooses, and when we see that the legislature, in establishing railroad corporations, has always been so careful, not only to bestow upon them attributes and powers consistent with no other idea than that their purpose is public, but to lay upon them also obligations and duties which would be clearly unjust and arbitrary in any other view; and when, in addition to this, we find the statutes full of declarations that the use is a public use, it would seem that nothing which falls much short of absolute demonstration would warrant the court in holding that the use is after all private.

Thus far, indeed, the cases all agree. It is nowhere contended and is not contended by the plaintiffs that a railroad is not a public use in such sense that land, the private property of individuals, may be taken for its construction. But a strenuous effort has been made to distinguish between the nature of a public use that warrants the exercise of the power of eminent domain, and that which warrants the exercise of the taxing power in its behalf. Of course the use which warrants the taking of land for a road-bed must be public, otherwise every charter granting that right and every general law recognising its existence and regulating the mode of its exercise has been nothing less than an arbitrary and despotic interference by the legislature with private rights of property in flagrant violation of art. 12 of the Bill of Rights, as well as the other provisions of the constitution, whereby those rights are secured.

The argument, then, admits that the use is public, but helds that it is not sufficiently public, or is not public in the particular way to bring it within the category of objects for which taxes may be imposed; either in degree or kind the public quality which it confessedly possesses falls short of that required by the constitution to justify an exercise of the taxing power. It is incumbent on these who undertake to maintain this distinction to point out

clearly the differences on which it rests. An assertion that it does exist is not enough, nor is the argument advanced by a repetition of such assertion, even though made in confident and emphatic terms. What is the rule wherewith we are to determine when a given public use is of a character to warrant the exercise of one power and not the other? What is the principle to be applied? No one will contend that the power of eminent domain, and the taxing power, though similar, are in all respects identical, but all agree that neither can be exercised except for a public end: Which is the higher power, or, in other words, which requires the greater public exigency to call it forth? What is the nature of those objects which lie on one side of the line, and what of those upon the other side? Where is the line to be drawn and what are the reasons that determine its location? These are some of the questions not to be evaded, or met with much speech and ingenious ratiocination, but to be answered fairly and clearly, before a court can say that the legislature have beyond all reasonable doubt transcended their constitutional powers in declaring that a use which is of such character, that is, public in such sense that private property may be taken and appropriated in its behalf, is also a public use in such sense that taxes may be levied in its behalf.

In those cases to which we have been referred by plaintiffs' council, where an attempt to do this is made, it does appear to me the failure has been rendered only more conspicuous ty, the eminent ability of those who have undertaken the task; and after a most enteful examination of those cases, if we were to bold that a rail-read, being a public use for which the land of individuals may be taken against the owner's consent, is not a public purpose for which taxes may be imposed, I should be utterly at loss what cound reason to give for the distinction, or in what terms to frame a rule to govern the fature action of the legislature in cases of a like description.

Unless the court are to stand between the people and their representatives, and declare when the latter have misjudged in their deliberations, and set up limits to the legislative powers of the general court not found in the organic law of the state, it is clear to my mind that this law cannot be annulled by a judicial sentence or decree.

AL BEHEFIT LIFE INB. CO. a. TISDALE.

Supreme Court of the United States.

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is evidence and two constants of his right to suc.

But in an entire between strangers, such letters are not nonlecible as evidence of the death of the decadent.

In an action by a wife upon a policy of insurance on the huchand's life in her favor, letters of administration to her upon his estate are not oridance of the husband's death.

In error to the Circuit Court of the United States for the District of Love.

This action was brought upon a policy of insurance, issued to Mrs. Tiodale upon the life of her husband. Evidence was given tending to show the death of Mr. Tindale on the 24th of September 1866. This evidence consisted chiefly in the sudden and mysterious disappearance of Mr. Tiodale, under circumstances making probable his death by violence. Evidence was given by the defendant tending to show that he had been seen alive some months after the date of his supposed death.

To sustain her case the plaintiff offered in evidence letters of administration upon the estate of her husband, issued to her by the county court of Dubuque county, Iowa. The defendant objected to the admission of this evidence. The objection was over-ruled and the letters were read in evidence, to which the defendant excepted.

In the charge of the judge, he said: "The real question is whether Edgar Tindale was dead at the time of issuing the letters of administration. It is incumbent on the plaintiff to prove that fact. She has shown as evidence of that fact letters of administration issued to her as administratrix by the probate judge. It is the duty of the court to instruct you that this makes a prime facie case for the plaintiff, and changes the burden of proof from the plaintiff to the defendant. * * * Without contradictory evidence, these (the letters of administration) give the plaintiff the right to receiver." To the charge in this respect the defendant excepted.

The opinion of the court was delivered by

HUNT, J.—In an action brought, not an administrator, but in an individual character, to recover an individual debt, where the right of action depends upon the death of a third party, to wit, an insurance upon his life, do letters of administration upon the estate of such person, issued by the proper probate court, asked legal evidence of his death? This is the question we are called upon to decide. It is presented obsepty, and is the only question in the case.

The authority in favor of the admission of the letters as evidence of the death of the party, in a sait between strangers, is a general statement to that effect in 1 Greenl. Bvid., § 550. The cases steed by the writer in support of the proposition are Thompson v. Donaldson, 8 Bap. 64; French v. French, Dickons 265; Mamblin's Osea, 8 Rob. La. Rep. 180; Jeffere v. Madelyf, 10 N. H. 245. In the case first sited the authority does not support Mr. Greenleef's statement. It was held that the letters did not afford sufficient proof of death, and, no further evidence being given, the verdict was against the claiment. In French v. French the court hold in terms against the theory that the letters were evidence of death, "but under all the circumstances admitted the probate as evidence of doath." This case was that of a bill filed by an heir against one in possession of the estate, and in that case Mr. Greenleef hardly contends that the letters are evidence of death. In Theale v. Con. Life Ins. Co., 26 Iowa 177, and in the same case in 28 Iowa 18, cited by the defendant in error, the law was beld as claimed by her. The other cases cited by the defendant in error, including Hamblin's Ones, are those where the administrator or executor was a party to the suit in his representative espacity, in relation to which a different rule preveils.

In the New Hampshire case above cited there was evidence to sustain the ruling independently of the letters, and the case concedes that the law is otherwise in England, and bases itself upon

the possiliar organization of the courts of that state.

On the other hand, the text-writers—Phillips on Evidence, vol. 2, p. 98, m, ed. 1868; Tamlyn, 48 Law Library 184, referring to Moone v. Dec Barnelles; limbback on Succession, 81 Law Library 163—concur against the rule hald down by Mr. Greenloof.

In Moone v. Dee Bernatics, I Russell 807, it was hold that letters of administration were not principled evidence of death, and the defect was supplied by other evidence. Lord Exper says, in Clayton v. Graham, 10 Vec. 208, that it is the constant practice to require proof of death, and that probate is not sufficient. In Least v. Lassi. 8 Jun. 211. He Kurany Brugg reflect to write

the payment of money upon letters alone, but required other evidence. In Blackham's Case, 1 Balk. 290, it was held that the sentence of the spiritual court in granting letters is not evidence upon any collateral matter which would have prevented the issuing of the letters.

In speaking of judgments in rem, and where the judgment may be evidence against one not a party or privy to it, Mr. Starkie eays: "This class comprehends cases relating to marriage and bastardy where the Ordinary has certified sentences relating to marriago and testamentary matters in the spiritual court:" I Starkie on Evid. \$72, m. What is meant by this is explained at a subsequent place, where he says: "The grant of a probate in the spiritual court is conclusive evidence against all as to the title to personalty, and to all rights incident to the character of an executor or administrator:" p. \$74, m. He cites in support of this statement the case of Allen v. Dundse, 3 Term Rep. 125, that payment of money to an executor who has obtained probate of a forged will is a discharge to the debter. The grant is conclusive in all business transacted as executor, and concerning the duties of the executor, that it was properly made.

This accords with the principle hereafter laid down.

The chief ground of argument to admit letters testamentary as evidence of the death of the party, is that the order of the probate court issuing them, is an order or judgment in rem. But a judgment in rem is not prime facile evidence; it is conclusive of the point adjudicated unless impeached for fraud: 1 Starkie on Evid. 872, m; Freeman, infra. If adminsible on this principle, the letters were conclusive evidence of the death of Tiedale. But this is not claimed by any argument.

Again, the probate court has never adjudicated that Tiedale was dead. Death was not the res presented to it. Shall Mrs. Tiedale receive letters testamentary? was the res, and upon that only has there been an adjudication: Hubback, supre, 162, m.

The letters testamentary issued to an administrator by a probate court, as a general rule, are evidence only of their own existence. They prove, that is to say, that the authority incident to that effect or duty has been develved upon the person therein named; that he has been appointed, and that he is executor or administrator of the party therein assumed to have departed this life. Different states have different provisions as to who may be executor or administrator.

ministrator, excluding some persons and preferring others, in the order and manner in their statutes specified. Thus, persons convicted of infamous crime are excluded from this office, and persons of notoriously evil lives may be passed by, in the discretion of the probate court. Sons or daughters or widows are entitled to take in preference to others; unmarried women are entitled in preference to married women. Certain notices may be, and usually are, required to be given of the proceedings to obtain letters testamentary. On all this class of subjects the letters are the evidence that the proceedings have been regularly taken, and that the person or persons therein named are those by law entitled to the effice. Upon these points the court has adjudicated. No proof to the contrary can be admitted in an action brought by the executor as such. Parties wishing to contest that point, must do it before the probate court, at the time application is made for issuance of the letters, or upon subsequent application, as the case may require.

In an action brought by such executor or administrator touching the collection and settlement of the estate of the deceased, they are conclusive evidence of his right to sue for and receive whatever was due to the deceased. The letters are conclusive evidence of the probate of the wifl. It cannot be avoided collaterally by showing that it is a forgery or that there is a subsequent wifl. The determination of the probate court is upon these precise points and is conclusive: 2 Smith's Lead. Cas., 6th Am. ed., 669; Vanderpool v. Van Valbenberg, 6 N. Y. 190; Colline v. Rose, 2 Paigs 396; Preeman on Judgments 507, citing numerous cases.

If the present suit were brought by the plaintiff as executor or administrator to collect a debt due to her deceased husband or to establish a claim arising under a will, of which probate had been made by her, she would have been within these rules. The letters testamentary would not only have been competent evidence, but they would have been conclusive of her right to maintain the action, and unimpeachable except for fraud.

Such, however, is not the case before us. The suit is by the plaintiff of an individual, to recover a debt alleged to be due to her as an individual. It is a distinct and separate preceding, in which the question of the death of the hashand comes up collaterally.

The books abound in cases which show that a judgment upon the precise point in ecutroversy current he given in evidence in

another suit, against one not a party or privy to the record. This rule is applied not only to civil cases, but to criminal cases and to public judicial proceedings, which are of the nature of judgments in rem.

If an indictment for an assault and battery by A. upon B. is prosecuted to a conviction, the judgment for some purposes is conclusive evidence. Thus, upon a subsequent indictment for the same offence, it would be conclusive in favor of A. that he had been ence tried for the same offence and convicted, and that he could not again be put in jeopardy therefor. But if A. suce B. for the same assault and battery, it cannot be doubted that it would be incompetent to introduce the record in the criminal case as evidence of the offence. For this purpose it is "inter alice acta." B. was no party to that proceeding. In theory of law he was not responsible for it or sapable of being benefited by it: I Starkie on Evid. 817, m.

So, if B. should afterwards be indicted for an assault upon A., arising out of the same transaction, the record would not be competent evidence to show that A., and not B., was in fact the effending party.

In some states provision is made for the admeasurement and setting apart of dower to the widow of a deceased person. Officers are appointed for this purpose, who make their certificate awarding particular property to her use, and file their report in the proper effec. Although this certificate is judicial in its character and assumes that the deceased had title to the property described, and the certificate is valueless except upon that supposition, it has still been held that it is no evidence of title, and that the title must be preved as in other cases: Jackson v. Randell, 5 Cowan 168; Same v. Etc. 6 Id. 816.

It has been held that a comptroller's deed for the non-payment of a tax due the state is not even primd facis evidence of the facts giving him the right to sell, such as the assessment and non-payment of the tax, although they are recited in the deed and this deed is in compliance with the statute. These facts must have existed to give a right to sell, but they are not established by the deed. They must be made out by independent proof: Tallman v. White, 2 N. Y. 66; Williams v. Pryton, 4 Wheel. 77; Beskman v. Bigham, 5 N. Y. 866.

A certificate of naturalization issues from a court of record when

there has been the proper proof made of a residence of five years, and that the applicant is of the age of twenty-one years and is of good moral character. This certificate is, against all the world, a judgment of citizenship, from which may follow the right to vote and hold property. It is conclusive as such, but it cannot, in a distinct proceeding, be introduced as evidence of the residence or age at any particular time or place, or of the good character of the applicant: Campbell v. Gordon, 6 Cranch 176; Stark v. Cheenpeaks Ins. Co., 7 Id. 420.

The certificate of steamboat inspectors, under the Act of Congress of 1852, is evidence that the vessel was inspected by the proper officer, but it is held that it is not evidence of the facts therein recited, when drawn in question by a stranger, although the officer was required by law to make a return of such facts: Erichen v. Smith, 2 Abb. Ct. of App. N. Y. 64; 38 How. Practice 454.

So it has been held that where a sheriff sells real estate, giving to the purchaner a certificate thereof. Although there can lawfully be no sale unless there be a previous judgment, and although the sale is based upon and assumes such judgment, and although the law requires the sheriff to give such certificate, the recital by the sheriff of such judgment furnishes no evidence thereof. It must be proved independently of the certificate: Anderson v. James, 4 Rob. Sup. Ct. 85.

So, on an application by a wife for alimony, pending a diverse suit prosecuted against her, the fact that her husband has recovered a verdict against a third person for criminal connection with her, has been held not to be even presumptive evidence of her guilt: Williams v. Williams, 8 Barb. Ch. 628.

Authorities of this nature might be greatly extended. Has upon principle nor extended to demonstrate that neither upon principle nor extended was it proper, in the individual suit of Mrs. Tiedale against a stranger, to admit letters of administration upon the estate of her husband as evidence of his death.

The judgment must be reversed and a new trial had.

On the general subject of the conclusiveness of the judgment of a probate court and its effect on third parties, see Bedriges v. Rest Biest Statings Incl. and note, and, p. 200.—Ep.

United States Circuit Court, Northern District of Illinois. ESSEX COUNTY NATIONAL BANK c. BANK OF MONTREAL

It is the duty of a hank to whom a check is sent for collection to present it and demand payment within the time prescribed by law, and if not paid notify the proper parties of its dishonor.

A bank upon whom a check is drawn is liable, before acceptance, only to the drawer; it cannot be made liable to the holder except by its own concent,

If a bank to whom a check is sent for collection, instead of demanding immediate payment, accepts a certification of it, that will create such a new relation between the parties as to discharge the drawer, and will render the bank accepting the certification in lion of payment, liable for any loss arising to the holder from the fallers of the bank upon which the check was drawn.

The party to whom the check is endorsed for collection, is the proper plaintiff, and an amendment, under the practice in Illinois, is allowable at the trial, subcolouting such party as plaintiff.

This was an action to recover from defendant the amount of a check sent to it for collection. The facts sufficiently appear in the opinion.

Hitchoock & Dupos, for the plaintiff.

Dexter & Smith, for the defendant.

Herkins, J.-P. Becker & Co., of Chicago, on the 8d day of August 1875, sent their check on the State Street Savings Bank to T. B. Peddie & Co., of New York, for \$856.87. It was endereed by the payers to the plaintiffs and by the plaintiffs was endorsed to the German-American Bank, New York, for collection. and by that book in the wound course of business was endorsed to the Bank of Montreal, of Chicego, the defendant, for collection. It belonged to the plaintiff in this case, but the plaintiff having 1:0 correspondent or agent in Chicago, it employed the German-American Bank to collect it, and that bank employed the defendant, according to usage among banks located at different points. The Bank of Montreal received the check about 11 o'clock on the morning of the 9th of August, and soon thereafter sent it by its messenger to the State Street Savings Bank for payment. The messenger presented it at the counter to the teller, who informed him that the cashier was not then in, and that he could not pay it in his absence. The messenger took the check away, and later in the day called again with it and presented it to the sume porty again, and he made the same reply, that the cechier was sut, and

he could not pay it until he came in. The messenger then asked the teller to certify it, which he did in the usual mode of certifying checks by that institution, and thereupon the messenger took the check away with him. The teller, when he certified the check, charged the amount of it up to the drawer's account, which then exceeded the amount of the check, and credited certificate account with amount of the same. The defendant also sent the check for payment on the next day at about 11 o'clock, and it was not paid because the bank had not the funds to pay it. The bank kept its doors open during all of the 10th of August, but had not the funds to pay the check, and failed to open after that day. The testimony is not very clear as to whether the bank had currency enough on the 9th to pay the check, if payment had been insisted upon, but as this point is not material in the view I have taken of the law of this case, I shall not stop to settle it; when it was presented after certification it was not paid because the bank was insolvent.

The defendants had the check to collect. It was transmitted to them for that purpose, and their duty as collecting agents was to present and demand payment within the time prescribed by law, and, if not paid, notify the proper parties of its dishonor. If that had been done, the rights and remedies of all parties liable upon it, when it came into their hands, would have remained intact. If less occurs by the acts or omissions of the party thus assuming the duty of collection, it should fall upon the delinquent agent, not upon the absent overseer.

The State Street Savings Bank was not liable to the holder of the check without acceptance. It was liable before acceptance only to the drawer: Chapman v. White, 6 N. Y. 412. It could not be made liable to the holder of the check except by its own consent. It had the funds of the drawers, and according to the usual course of dealing with its customers, was under obligation to pay on demand all checks drawn upon it by them, but a refusal to do so would not give the holder of the check the right to see the bank. The drawer in such case would be liable, and he could see the bank immediately, without redeeming the check, and the bank would be liable for damages for its refusel to perform its undertaking with him as depositor: Merehante' Bank v. State Bank, 10 Wall. 604, 605; Bank of Republic v. Millard, Id. 152.

This being the law, the daty of the defendant upon receipt of the check for collection was plain. It was to present it for nevment, and only for payment. This it did at first, and if it had stopped then there would have been no liability upon it. But it did not; it went farther; it asked for and received the certification of the bank upon the check. By this act a new relation was created between the parties. The amount the check called for was withdrawn from the drawer's account and control, and thereafter they had no right of action for it against the bank. The technical operation of the transaction was a transfer to the holder of the check of the drawer's funds and right of action against the bank. It superseded the previous rights and obligations of the parties, particularly of the drawers.

Before that, the drawers could have stopped payment of the check or withdrawn the funds by other checks. After the certification they had no control over the funds or action of the bank in reference to it, nor any right to sue the bank for it. the bank owe them any duty in relation to it. It no longer possessed the character of a check. If the drawers had taken it up before its certification it would have been useless, but after that they could only get the money by surrendering it. It resembles, after certification, more the certificate of deposit than a check. Now, what was the effect upon the legal rights and liability of the drawers? Did it not discharge them from all further liability upon the check, and if such should be found to be the consequence, does it not follow that the defendants are liable to the owners for the amount? If they have by their acts released the responsible drawers whereby the instrument is made worthless, why shall they not make good the loss?

In Smith v. Millard, 48 N. Y. 176, it is said that presenting a check for payment and accepting a certificate as good is equivalent to payment. In Morse on Banking, p. 282, it is laid down that, if the helder chooses to accept the bank's certification, no matter to suit whose convenience, there can be but one result. The promise of the bank on the drawer's account, accepted as satisfactory by the creditor, discharges the debtor, and by the same action deprives him of all further concern in the premises. The bank no longer owes him any duty which he can enforce, or for the breach of which he can sue. If this is the result of the act of the defendant in accepting the certification of the check, it would seem too clear for discussion that the defendant had incurred a liability to pay the amount of it to its principal. The drawers being re-

leased by the certification, and the bank being unable to pay, it follows irresistibly that the plaintiff is entitled to recover of the party releasing the drawers, whereby the amount of the check is lost to them.

It was claimed on the part of the defendant on the trial that the plaintiff must show some damages by the act. If the act released a responsible party that would be damage enough. But the law presumes damages from the negligence or unsathorized act of a collecting agent of commercial paper whereby any party to it is released or not charged: Commercial Bank of Albany v. Hughes, 17 Wend. 94. And if this presumption is not conclusive, but liable to be overthrown by proof to the contrary, is is the duty of the party at fault to show clearly that no damages did result to the holder of the paper from their negligence, which in this case the defendant did not do. It did not clearly show that the check would not have been paid on the 9th of August if payment had been insisted upon. I think the only safe and maintainable doctrine in this case is that the defendant assumed the rick of payment by the bank when it accepted the certification, and if the bank did not pay then they must. In laying down this rule I assume that the certificate operated as a release or payment as to the drawers, and that they were no longer liable upon the paper. This release I regard as the pivotal point in this case, and upon that point I am not forced to rely upon my own judgment. I find the precise question has been decided by the Court of Appeals of New York in the case of The First National Bank of Jersey City v. Leach, 52 N. Y. 850. That was an action on a check drawn by defendant on the 21st of November 1871, on the Ocean National Bank, payable December 12th 1871. The bank, the plaintiff in that case, discounted it for the payes, and at cleven o'clock A. M., on the 12th day of December, they presented it to the Ocean Bank, and got it certified as good. The drawer then had an account there sufficient to pay it, which was on the certification charged up to him on the Ocean Bank books. Within an hour after that the Ocean Bank suspended. The check was again presented on that day for payment, and was duly protested for non-payment. The bank then sued the drawer to recover the. The court upon that state of facts held that the amount of it. plaintiff could not recover; that the certification eperated as e payment as between the helder and drawer.

In the opinion it is said that "the law will not permit a check, when due, to be then presented and the money left with the bank for the accommodation of the holder without discharging the drawer." That if the holder chooses to have it certified instead of paid, he will do so at the peril of discharging the drawer.

But they say that "this would not discharge the drawer of a check who himself procured it to be certified and then put it in circulation; that the reason of the rule would not apply to him," and conclude the opinion by saying "that upon principle it must be held that the bank holds the money after certification by request of the holder, not at the risk of the drawer, but of the holder of the check."

This is the only direct authority I have found upon this question, from which I judge that the practice of holders of checks getting them certified is not very usual, for if it were, other cases would have found their way into the books and come under judicial consideration.

The defendant on the trial cited Bickford v. First National Bank of Chicago, 42 Ill. 28, and Rounds v. Smith et al., Id. 245. From an examination of those cases, I do not see that they conflict with the case of Bank v. Leach, 52 N. Y., supra. In those cases the checks were certified at the request of the drawer before delivery. This expressly appears in the last case, and the judge in his opinion in that says, "the case in all its important features is the same as Bickford v. Bank," so that I must assume that the checks in both those cases were certified by request of the drawer, which presents an entirely different question from this, and leaves the point involved here unconsidered in those cases.

In Brown v. Locker et al., 48 Ill. 497, cited by the defendant's counsel, the check was also certified by the request of drawer before it was passed by him, so that the reasoning of the court in that case was not predicated upon the same facts as appear here. But, as I understand those cases, that court holds that a check operates to transfer the amount named in it to the payee, and authorizes him to sue for and receive it from the bank. If such is the doctrine of that court, I am not at liberty to follow it, for the Supreme Court of the United States, in The Bank of the Republic v. Millerd, 10 Wallace 152, has decided differently. And as the question involved is one relating to commercial securities, and belongs to the domains of general jurispradence, this court is not bound by

the decision of the state courts where the matters arise: Township of Pine Grove v. Talcott, 19 Wallace 666. But, waiving this view and difference between the courts on this point, I do not think that the decision of the learned court of Illinois above referred to, when carefully examined, will be found to touch the point involved here. It was not before that court in either of those cases, and although the general language used might seem to be in conflict with the conclusions I have reached in this case, still when read and considered as used in reference to the fact and question before that court, no conflict or discrepancy of epision will be found to exist. Those cases are clearly distinguishable on the facts from this case, and are, therefore, not authority upon the point involved here. I am therefore of the opinion that the defendant is liable for the amount of the check, with interest from the certification, as by its certification the drawer was discharged.

A question was suggested as to the right of this plaintiff to sue the defendant, as it was not its agent, alluding to the recent decision of the Supreme Court of the United States in Hosper. Assignee, &c., v. Wise et al., vol. 8 Chicago Legal News, page 198, but it was stated, and not disputed, that the plaintiff's attorneys had authority to sue in the name of the German-American Bank. as well as in the name of the present plaintiff, the real owner, and it was claimed that an amendment under the laws of the state was allowable, in the discretion of the court, by inserting the name of the German-American Bank as plaintiff in lieu of the present plaintiff. And as a decision making the change necessary has been aunounced since the commencement of the suit, and as no in-· jury can recalt, as it appears to the court, to the defendant thereby, . I direct and allow an amendment in that respect by striking out of the process and pleadings the name of the present plaintiff and inserting in lies thereof the name of the German-American Bank, and, as so amount d that judgment be entered for plaintiff and against defendant for \$882.76, the amount of the check and interest, with costs of this suit to be taxed.

Supreme Court of Maine.

ELLA R. McLEERY & SALLY McLEERY.

A father died, leaving a widow. His homestead descended to his two sons. In consideration of their having the use and income of the whole estate, the sons, in writing, premised the widow an occupancy of a portion of the premises, and certain farm stock for her use, and a certain yearly payment. Afterwards, one son conveyed to the other. The latter then conveyed the entire premises to his mother by a warranty deed. Then he died, leaving a widow. In an action of dower by the widow of the son, against the widow of the father, it was held—

- i. That the agreement between the sons and the mother, did not operate either as an assignment of dower to her or as a release of dower by her.
- 2. That the condition of the senior widow, as to her own dower, is the same, essentially, as if it had been specially assigned to her.
- 3. That her right of dower was not extinguished by marger in the fee conveyed to her by her son.
- 4. That she is not estopped by the covenants of warranty in such deed from availing herself of her right of dower in this action; incomuch as such right was paramount to and independent of the title procured by the deed.
- 8. That there are two dowers in the estate; the senior widow having one-third of the whole, and the junior widow one-third of the remaining two-thirds, as dower; and that the junior widow is not now, nor will she be at the death of the senior widow, downble in any greater proportion thereof.

ACTION of Dower. Referred to the full court on a case stated.

S. Belcher, for plaintiff.

Philip H. Stubbe, for defendant.

PETERS, J.—William McLeery was seized of the messuage described in the writ. At his death, the tenant, who is his widow, became entitled to dower in it. Subject to her right of dower, the estate descended to his two sons. One of the sons, the husband-of the demandant, acquired his brother's interest in the estate, thus owning the whole. At his death, his widow also became entitled to dower. Both husbands are dead and their wives survive. Here, then, two widows are dowable in the same estate. Their respective rights were as follows: The tenant (wife of the father) having the older title in dower, would have for her dower ena-third of the whole. The demandant (wife of the son) being the , younger widow, would have one-third of the remaining two-thirds of the estate. Thus, the tenant would have three-ninths, and the demandant two-ninths thereof. This result comes from the principle established in the familiar maxim of ancient origin, that

"dower ought not to be sought from dower." Nor will the junior widow be dowable in the one-third that may be assigned to the senior widow, upon the death of the latter; and for this reason. In order to recover dower, she has to count upon her husband's scisin. But during his lifetime he had no scisin of the one-third, which goes to his mother as dower. When his mother's dower is assigned to her, she partakes selsin therein by relation from her husband, continuing his seisin, and to that extent defecting the seisin of the son, who in such one-third has only a reversion. Had the son received the title of the estate from his father by deed, and not by descent, the rule would be otherwise. In such case the son would have had a soisin in his lifetime of the whole estate, sufficient to give his wife dower in the two-thirds during his mother's lifetime, and in the whole estate when the mother's title to dower ceased: Gear v. Hamblin, 1 Maine &1; Brooks v. Everett, 18 Alien 457; 4 Kont's Com. 64. See also, under apprepriate heads, Washburn's Real Estate and Scribner on Dower, for a more particular elucidation of the principles stated.

But the question arises, whether the demandant may not be downble in the whole estate, instead of two-thirds thereof, upon the ground that the title of the elder widow to dower has been in some way extinguished or lost. And this is claimed by the domandant to be the case from several causes.

First, she contends that the paper given by the sons to the mother has that effect. And upon the other hand, the tenant claims that her acceptance of the paper amounted to an assignment of her dower. But our opinion is that the agreement had neither the one effect nor the other. It neither assigned dower, nor extinguished it. It was not an extinguishment of dower, because there is no release or conveyance under her hand or scal, nor does she in any way design or attempt to surrender her right. Mor would it operate as an assignment to her of her dower. A portion of the consideration to her in the agreement consists of the encentory promises of the sons, which may never be fulfilled. The agreement (not signed by her) merely related to "the use and income" of her dower by the sons until set out to her. It operated only to suspend her claim for a time: Sargent v. Referts, 34 Maine 185; Austin v. Austin, 56 Id. 74.

Then a question arises, whether the demandant may not have dower in the whole estate until the dower of the tenant has actually

been assigned to her. It is held by text-writers, and is so decided generally, that the maxim dee de dote peti non debet does not apply when there has not been an actual assignment to the first widow. This is upon the principle that the husband of the second widow may be considered as select in his lifetime of the estate charged with the right of dower of his mother, as against all others but her. A stranger cannot avail himself of the contingency that the first widow may never enforce her right. When she does enforce it, then an assignment already made to the accord widow becomes wholly defeated or diminished thereby: Dunham v. Oshorn, 1 Paige 684; Reynolds v. Reynolds, 5 Id. 161; Safford v. Safford, 7 Id. 259. To the same effect are the cases cited supra. See also Young v. Tarbell, 87 Maine 609. But the answer to this position is, that the rule does not apply to this case. The tenant is not a stranger. She is in possession, claiming her estate of dower. Her condition is the same essentially as if a special assignment had been made to her. There is no need of a separation of her estate in dower, from her estate of inheritance, for any practical purposes. She does elect to enferce her claim, by a resistance to the claim of the second widow. If the demandant should recover according to her claim, the tenant might perhaps have an action against her to recover a part of it back again. We think the legal rights of the parties can be as well settled in the present action as in any other way.

Then it may be argued that the tenant's right of dower has been lost by consolidation with the fee conveyed to her by her son. In Leavitt v. Lumprey, 18 Pick. 882, it was decided that a second widow was not entitled to dower in the whole of an estate against the tenant to whom the senior widow had conveyed her right after she had recovered judgment for dower therein, but before it was set off to her. While in Atwood v. Atwood, 22 Pick. 288, it was held that a prior right of dower which had been released to the tenant before any suit to enforce the same, could not be set up to diminish the claim of a second widow who claimed dower in the whole estate. But we have already expressed the opinion that in the case at bar the senior widow is in the same condition and bears the same relation with all parties interested as she would if her dower had in point of fact been set out to her. Bhe is entitled to a life-estate of one-third. Bhe is in actual possession of it as well as of the reversion, and she is defending her possession. In this

state the doctrine of merger is not favored in law or equity. It is clear enough that if this was a proceeding in equity a merger could not be regarded as taking effect. It is manifestly for the interest of the tenant to keep her two titles distinct, in order that the demandant may recover no greater amount of dower than she would have been entitled to if they had continued to be held by different The tendency in the courts has been to admit the application of the same principle, in proceedings at law in cases where the forms of the transfers are such that it can reasonably be effectual. The tenant having all of the estate, including her right of dower therein, may cortainly be regarded as having her estate of dower as effectually as if she had recovered judgment therefor. She cannot sue herself to obtain it. She has it. Having the whole estate, she has all the parts: Campbell v. Knights, 24 Maine 882; Holden v. Pike, Id. 427; Simonton v. Gray, 84 Id. 50; Strong v. Converse, 7 Allen 557; Savage v. Hell, 12 Gray 865.

The point, however, upon which the demandant places the greatest reliance and stress, is that the tenant is barred from her claim of dower, upon the technical ground of estoppel. It is contended that, by accepting from her son a deed of the premises with the usual covenants of warranty, she admitted that be was fully select of all the premises as of fee, and the argument is that she is now estopped to show the contrary. In support of this view, Lewis v. Meserse, 61 Maine 874, is cited for authority. The tenant admitting Lewis v. Meserve to be correctly decided, denies that it can apply to a case like the one at bar. We think the distinction is well taken. That case was decided with exact correctness, having reference to the actual question them before the court for their determination. There it appeared that the tenant who resisted the claim of dower, obtained all his title from the husband of demandant, and there was no pretence that he had any kind or claim of title from anybody else. He merely set up that some one else might have a title peramount to his. But he had no relation with it, if it was so. The court were clearly of the epinion that he was estopped to deny the seisin of his own granter, who was the husband of the demandant in that suit. All the cases are in accord as far as that case goes. The point is there briefly alluded to, the decision of it not being really necessary to the result of the case. But the present case is a different one.

the right and title of her grantor. She had no occasion to purchase what already belonged to her, nor is it to be supposed that there was any design by her to do so. Her grantor had already acknowledged and submitted to her superior claim. The reasonable presumption is that she paid for the premises, deducting from the price for the entire premises the value of what was already her own. It would seem hard and inequitable that the mere form of the instrument of conveyance should have the effect to deprive her of a valuable interest and right which she already possessed. Such a result was undoubtedly never dreamed of by the parties concerned when the conveyance was made. Nor does the law require it to be so. We are aware that there have been contrary decisions upon the point presented. Nor is there a satisfactory consistency upon it in the decisiens of our own state. But we regard the opinion in the leading and important case of Foster v. Dwinel, 49 Maine 44, as a settlement of the question so far as the rights of this tenant are concerned. That case has been much commended by several text-writers since it was promulgated, and believing that the arguments and conclusions of the court therein are based upon sound logic and good sense, we see no good reason why it should not be adhered to in a state of facts like those presented in the present case: Bigelow on Estoppel 71; 2 Scribner on Dower 227.

Judgment for demandant for her dower in two-thirds of the premises described in the writ.

APPLETON, C. J., WALTON, BARROWS, DANFORTH and VINGIN, JJ., concurred.

Circuit Court of the City of Richmond, Virginia.

W. B. DUNCAN AND P. C. CALHOUN, TRUSTERS, v. CHESAPEAKE & OHIO RAILROAD CO. 27 ALS.

Employees of a defaulting railroad company are not to be considered as crediture at large of the company in regard to their claims for wages in arrears at the time of the appointment of a receiver for the company.

When mortgages come into a court of equity seeking satisfaction of their claims against a railroad company by suit for foreclosure, they should be required to extisfy all arrearages of pay due employees out of the trust property or its future turnings.

This was a cause in equity, which came up on motion and was heard at the February Term 1876 of the Circuit Court of the City

of Richmond, on the report of the Hon. W. C. Wickham, receiver, asking the instructions of the court as to the disposition of the surplus carnings of the railroad, and requesting to be allowed to discharge the arrears of pay due employees prior to his appointment as receiver.

W. J. Robertson, H. T. Wickham and W. H. Hogeman, for receiver, in support of the motion.

James Lyons and J. A. Jones, contra.

Shipman and Barlow, Larvoque of MacFarland, of New York, for complainants, assented to the motion.

Wellford, Circuit Judge.—Under orders heretofore entered in this cause, the court, in the interest of the creditors, has assumed control and administration through its receiver of all the franchises and property of the Chesapeake and Ohio Railroad Company. That company was successor to the Virginia Central Railroad Company, and in succeeding to all its franchises and rights of property, assumed all of its outstanding obligations.

It is admitted that these franchises and property thus acquired cum oners, are abundantly sufficient to satisfy the creditors of the Virginia Central Railroad Company, and their claims are conceded to be paramount to those of any claimants under obligations of the Chesapeake and Ohio Railroad Company.

There appears to be no doubt that their claims will be paid to the full extent of principal and interest out of the property new under the control of the court.

These creditors have patiently forborne to press their rights, and being now entitled to payment of arrears of several instalments of interest, and some of them to payment of principal, may proposly expect every reasonable consideration in the disbursement of any funds subject to the order of the court, as far as may be practicable, towards the satisfaction of their claims. But, unbappily for all parties to this cause, the immediate satisfaction of the most meritorious claims is altogether impracticable. My province is simply to determine how far it is practicable under the circumstances, and so far, to order that it shall be made.

The creditors of the Virginia Central Reilroad Company, as well as all the creditors of the Chesapsake and Ohio Railroad Com-

pany, who are practically interested just now in any orders of this court, claim under obligations of those companies secured by several deeds of trust executed by the respective companies, conveying in very comprehensive terms all corporate franchises and rights of preparty. These deeds were frequently in common parlance and are cometimes in these proceedings styled mertgages, and I shall accept the phraceology, notwithstanding its inaccuracy.

It was a substantial part of all these mortgages that the custody, control and administration of the trust property should be left undisturbed in the hands of the railroad company, not merely until default in the terms of their covenants, but thereafter, until, in the intelligent discretion of the trustees, or upon the command of a large fractional representation of the hondbolders, or in the judgment of a court of competent jurisdiction, such existedy should be changed.

The character of the security offered for the investments asked by the corporation in placing its bonds upon the market, made this provision of the mortgages a most essential element of the contract. Back mertgage contemplated an indefinite number of certain que trust, varying in amount of interest and subject as to persons and amount to all the fluctuations of the money market. The security tendered was not to be measured in its value by the probable result of any every-day sale under the hammer of the auctioneer. The great value of the security consisted in the importance of the franchies and the providence with which the money contributed for its . development should be appropriated to the construction of a great later-state highway, the accumulation of all necessary material for transportation of persons and property, and an economical and emergetic proncoution of the work. The corporation was engaged in a great experiment, and upon the success of that experiment necessarily depended, to a great extent, the value of all its obligations. But it was a corporation based upon solid and substantial investments, to which millions of money had been contributed by the Commonwealth and several of the counties of Virginia and many individual citizens of Virginia and her sister states.

The value of all this investment of capital was at stake, and made subordinate by the mortgages to the value of the bonds. The guarantee of the intelligent and watchful self-interest of the stock-bolders, to ensure the success of the experiment, was therefore no inconsiderable element in the security of the bondholder.

It was not unreasonable to suppose that they would see to it that the administration of the rowl would be confided to officers of intelligence, capacity and providence, and that these officers, selected by the stockholders to protect their interests, would be not unsefe protestors of the paramount interest of the bondholders. The laws of the Commonwealth required the periodical selection of these officers, gave to every stockholder a voice in such selection, and measured the value of his voice in proportion to the value of his interest by a prescribed rule. But after their election, during their continuance in office in the interest of the great mass of the stockholders, the law protected them in the intelligent discharge of their responsible trusts from the interference of any inconsiderable fraction of the individual stockholders. It was in like manner, in all these mortgages, deemed necessary, in the interest of the great mees of the bondholders, to protect these officers against unnecessary and improvident interruption by a few impatient or capricious bondholders. For the protection of the bondholders, gentlemen of intelligence, position and character were designated in each mortgage as trustees, and large powers, to be exercised in their discretion for the benefit of the esseuis que trust, were conferred upon them. But that discretion was not left unlimited. Equally in the interest of the company as in that of the mass of the beneficiaries, the power to require the trustees, after default of the company, to enforce the trust, was studiously withheld from any single beneficiary or any inconsiderable number of the beneficieries. Power was conferred upon the trustees in some of the deeds to act after default according to their own discretion to the extent of selling the trust property; but no such sale could be made without advertisement for such length of time in advance as would give full opportunity to any and all parties in interest to invoke the interference of a court of equity, and esforce the execution of the trust in subordination to its decrees.

In none of the deeds, however, was power given to the trustees, in advance of sale, to direct the control of the effects of the company at their own independent election. Buck power was given in exerci of the deeds, certainly in that under which the complainments claim, but only in the contingency that the trustees should be so required by a prescribed number in interest of the beneficiaries.

Until the administration of the trust property was assumed by this court through its receiver, note of the trustees, in the exercise of their discretion or in obedience to the command of the requisite number of cestuic que trust, ever suggested, in the discharge of their trust, the propriety of dispossessing the constituted officers of the company. The receiver of this court, under the orders of this court, acquired possession of the trust property only from those constituted officers.

All of these martgages, it will be observed, invited the investment of capital upon faith in the security of an uncompleted railread, and every purchase of a bond involved upon the part of the purchaser a like confidence, to a certain extent, with that which the state in conferring the franchise, and the stockholder in investing his money, reposed in the executive officers of the company for the faithful and energetic discharge of the duties assigned to them by the fundamental law of the corporation. That duty involved the prosecution to a successful completion of the projected railroad, and as rapidly as it could be completed even partially, the administration and conduct of any completed parts as common carriers of persons and property, under all the obligations as such to the state and the public. In consideration of their paramount interest, the bondholders were invited to confide, and by their acceptance did confide, to the stockholders the selection of these officers, until, after default of the company, they might elect to enforce the trusts of the decds.

In the meantime these officers, in the common interest of stock-holder and bondholder, were charged with their grave responsibilities. To meet them, the subscriptions of stock having been exhausted, they could have in contemplation of all parties no possible means except the earnings of the road and the credit of the company, so far as it might with recorded notice of the liens of the bondholders be at all available.

Prior to any default of the campany in the payment of interest apon the bonds, it was not unreasonable to suppose that the credit of the company might be available with its officers for this purpose. But immediately upon default, publicity of the embarrassment of its finances was unavoidable, and after that default had continued a few months the company became simply a tenant at the will of the bondholders of all its corporate franchises and preparty. Thereafter the credit of the company could certainly not have been contemplated as adequate to the necessities of the officers

in charge in maintaining and preserving the value of the trust property.

What, then, had they to rely upon? Under the letter of the contract, upon nothing but the earnings of the read so long as it might be permitted to remain in their hands. But it certainly ought to have been contemplated, in making the centract, that this might prove to be an insufficient reliance. The earnings of the read were necessarily subject to the viciositudes of trade and travel, and dependent upon the continued preservation, in despite of all accidents, of the continuity of its read and the regularity of its trains, and upon the confidence of the public in the providence and watchfulness of the officers charged with the central and management of the read in insuring all necessary and available enfoquerds against accident to life, limb or property.

That providence and watchfulness necessarily required the continual outlay of large sums of money in daily expenditures for purchase of material of every description and provision for anticipated emergencies all along its four hundred and twenty miles of track. It imposed the necessity of the employment of a small army of subordinates all along its roadway and in control of every moving train, to be controlled and directed by skilled and intelligent overseers. The laws of humanity, the police laws of twe states, overriding all questions of pecuniary interest in stockholders or bondholders, forbade the relaxation of that providence and vigilance, whatever it might cost, for one instant of time.

These necessary supplies could not be purchased by the pound or the piecemeal from day to day. This army of employees could not be paid all along the readway with the setting of every sun. Those who furnished the one were compelled to await the erdinary routine of auditing and settling the account, incident to every business of magnitude, and the employees had to await the arrival of some periodic pay-day. If the officers in charge of this read were under obligation to announce, upon offering to make every purchase and in engaging the services of every such necessary suberdinate, that pay for such purchase or labor was to be forfeited at any moment when the bondholders might elect to arrest their administration of the read, it would have been manifestly impracticable to continue the operations of the read with any safety to the public for one single day after the right of the bondholders to take pushesses of the read had been consummate.

Were they under any such obligation? The contract did not command them to surrender possession to the trustees until required. They had no right of their own election, without the orders of the stockholders who had placed them in charge, to do so. Their duty under the law to the stockholders, and their duty under the contract to the bondholders, required them to retain possession. But if they were under any such obligation, it necessarily involved the impossibility of their continuing to conduct the road, and the unavoidable and immediate suspension of all trade and travel along its track. To say nothing here of the breach of faith to the Commonwealth which conferred the franchise, and the great inconvenience to the public in whose interest the franchise was granted, such a suspension would have necessarily impaired immensely the value of the security of all the bondholders.

It appears from the record of this case that the officers of the Chesapeake and Ohio Railroad Company were placed in this dilemma. There is certainly nothing now before me which requires any censure of their conduct under these embarrassing circumstances. I have only occasion to consider that matter, however, so far it may affect the rights of those who dealt with them under these circumstances as the representatives of all parties interested in the franchises and property.

There can be no difficulty in rejecting any claim upon the funds under control of the court, preferred by any parties who can properly be regarded as creditors at large of the Chesapeake and Ohio Railroad Company, however meritorious the consideration upon which their claims against the said company may be based. Even if there be material furnished by any such creditors now in the daily use of the receiver, if such material were furnished on the credit of the company, any claim on account thereof must, in the absence of any lien retained by the special contract or reserved by the law, be subordinate to the recorded lien of the mortgages.

But can the claims of the employees of the company for arrearages of pay, or the comparatively small class of claimants referred to in the third clause of the receiver's report, be properly regarded

¹ The following is the part of the report referred to :--

[&]quot;III. There is a clear of claims which it is proper that I should bring to the motion of your honor, arising from the purchase of material for the use of the read in the month of Reptomber 1878, and the first eight days of Outsbar. Much of this material was on hand, at the time that the read was taken out of the hands of the assessment on the 5th of Charles by the order of the Charles Charles and the

in this suit as claims of creditors at large of the Chesapeake and Obio Railroad Company?

I am not required to consider how these claims should be regarded if this were an application by the claimants to arrest the action of the trustees, or any of them, under the powers granted by their several deeds. This matter presents itself as incidental in the enforcement by a court of equity of the equitable rights of the bondholders under one of the deeds. So far as they are concerned, they have voluntarily subjected themselves to the enforcement of all equitable principles in the administration of the property under control of the court. The beneficiaries under the second mortgage of the Chesapeake and Ohio Railroad Company being subordinate in interest to them, must, I take it, necessarily bear the ill consequences, if any, of the fundamental rule of this court, invoked by the complainants, that he who asks equity must do equity.

I incline to the opinion that the beneficiaries under all the Virginia Central Railroad mortgages, though superior in dignity to those represented by the complainants, are in this suit amenable to the same rule. But it is unnecessary to consider that question. It is conceded on all hands that the claims of these creditors are paramount, and that payment in full of principal and interest will be made to them; and as the allowance of the claims under consideration—confessedly of a high equitable character—can only postpone the realization of their full rights, they must, under familiar principles governing all proceedings of courts of equity, submit to the delay.

I am of opinion that these unpaid employees and other claimants referred to cannot be regarded as creditors at large of the Chesapeake and Ohio Railroad Company. If it can be said that they

United States for the Eastern District of Virginia; part of it is still on hand amongst the stores of the company; a part of it has been worked up in the repair of engines which are still undergoing repairs, and is not yet in use.

"The purchase of the articles, the subject of these claims, was regarded by those who said them, and by the officers of the company who beight them, as a cash one, and payment was only delayed by the custom that provaile to mercantile transactions of a like character, of rendering mentily bills for the current mentile deppties, and having them paid about the first of each month, instead of demanding each for each article as it is furnished. These claims would, had not the United States Court taken the read out of the company's hands, all have been paid in the mentile of October and Movember, in the regular source of the company's business. They amount to about \$17,000. I ask for authority to pay these eleters."

extended credit at all, it was credit not to the Chesapcake and Ohio Railroad Company, but to the officers then in charge of its franchises, rights of property, &c. The Chesapeake and Ohio Railroad Company had been then so long in default that the right of the bondholders to claim possession was fully consummate, and this was a matter of common notoriety. It could not be expected that the employees all along the track of this road should pause amidst their unceasing round of daily duty to inquire whether the bondholders had or had not asserted their rights and assumed control. It was enough for them to know that the service they were rendering was such service as any proprietor would necessarily require, and they had a right to believe that the officers left in notorious occupency of the property, and charged before the public with the responsibility of its care and custody, were abundantly authorized to act for all whom it might concern in contracting for their services.

The same principle will run through all the gradations of employment in this great corporation. These employees of every grade and dignity had every right to believe, that so long as the bondbolders stood aloof without asserting their rights to possession, they were willing to accept and regard pro tante as their agents for the preservation and protection of the property, the officers who, placed in charge thereof by their defaulting creditor, could not in good faith to the creditor or the debtor abandon their posts, or be derelict while they held them, to the trusts which they imposed.

These bondholders are now in a court of equity seeking satisfaction of their claims against the railroad company. They have a right to be satisfied to the extent of an entire forfeiture of all the proprietary rights of the company; but to concede to them, in enforcing such forfeiture, a right to repudiate all responsibility to satisfy these highly meritorious claims of employees, &c., out of the property or its future earnings, would be grossly inconsistent with plain equity. In this forum they must be held to be estopped from denying the authority of the officers of the company under the circumstances, as agents for themselves as well as other parties in interest, to have incurred such liability.

A recent decision of the Court of Appeals of Kentucky, in a semewhat similar case, of Douglas, &c., v. Cline, &c., of which I have been furnished by counsel with a newspaper report, fully sustains these views.

It seems to me, therefore, very clear that these claims must be recognised as properly chargeable upon the trust fund. The complainants and the defendants, trustees under the seven per cent. mortgage of the Chesapeake and Ohio Raiload Company, concur with the receiver in advising the payment of these claims. The holders of bonds secured under the mortgages of the Chesapeake and Ohio Raiload Company, all of whom they represent, are the only parties who can be ultimately affected by such payment, and I am happy to have their assent to the entry of an order which, in despite of all their opposition, must have been entered, authorizing and requiring the receiver, as promptly as practicable, to satisfy these claims.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF ILLINOIS,¹
COURT OF APPEALS OF MARYLAND.²
SUPREME COURT OF MICHIGAN.³
SUPREME COURT OF PENNSYLVANIA.⁴

ATTORNEY.

Parties in Pari Delicto—Different degrees of Guilt as between the Parties to a Fraudulent Transaction—Relation of Attorney and Client arising between Parties in Pari Delicto.—There may be different degrees of guilt as between the parties to a fraudulent or illegal transaction; and if one party act under circumstances of oppression, imposition, under influence, or at great disadvantage with the other party concerned, so that it appears that his guilt is subordinate to that of the defendant, the court, in such case, will relieve: Roman v. Maki, 42 Md.

Where the parties to a fraudulent or illegal transaction are in part delicte, the simple fact, that at the time of such transaction, the relation of client and attorney exists between them, will give the former no claim to the aid of a court of equity to have restored to him the property of which the latter has become possessed by their joint fraud. Such relation alone will not except the case from the general rule, in part delicte potior est conditio possidentis, aut defendentis: Id.

I From Hon. N. L. Freeman, Reporter; to appear in 77 Miluois Reports. The Reporter having determined to publish the latest decisions at once and bring up the others afterwards, there will be a temperary gap from vols. 68 to 74, which will be filled hereafter.

[.] I From J. Sheaf Stockett, Koq., Reporter; to appear in 48 Maryland Rep.

^{*} From Hoyt Post, Eoq., Reporter, and Henry A. Chancy, Req. Cases decided at January Term 1876. The volume in which they will be reported cannot yet be indicated.

[!] From P. France Smith, Koy., Reporter; to appear in 76 Pa. State Reports.

An atterney is under no actual incapacity to deal with or purchase from his client. All that can be required in, that there has been no abuse of the confidence reposed; no imposition or undue influence practiced, nor any unconscionable advantage taken by the atterney of the client. When a transaction between parties occupying such relation to each other in brought in question, the onus of the case is cast upon the atterney of aboving that suching has happened in the course of the dealing which might not have happened had no such connection subsisted, and that the transaction has been fair in all respects. If the court be nationed that the party holding the relation of client performed the act or entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect, and that no concealment or undus means were used to obtain his consent to what was done, the transaction will be maintained: Id.

He who comes into equity must come with clean hands; and if a party seek to cancel or set noide an instrument, or be relieved of a transaction, or recover property, on the ground of fraud, and he himself has been guilty of a wilful participation in the fraud, equity will not interpose in his behalf: Id.

BANKRUPTOY.

Recording Assignment of Lond—Assignce's Sale.—An assignment of a bankrupt's land by a register to an assignment in bankruptey, not acknowledged or proved as required by the laws of Pennsylvania, cannot be recorded in that state: Zeigler v. Shome, 78 Penna.

From the commencement of proceedings in bankruptcy the entate of the bankrupt is in the custody of the District Court of the United States; its jurisdiction is superior and conclusive and its decrees final

and absolute: Id.

A purchaser at an assignee's sale of a benkrupt's property under an order of the District Court and decree confirming it, is not bound to see that every particular in the appointment and qualification of the assignee has been complied with; he takes whatever title was in the bankrupt:

Land was sold as a bankrupt's; in ejectment against him by the purchaser, he defended on the ground that the right of possession was in his wife when the writ was served. If the wife had no title, her possession was that of her husband and the defence could not be sustained:

COLLATERAL SECURITY. See Debter and Creditor.

COMMON CARRIER. See Contract.

CONSTITUTIONAL LAW.

Presumption as to Passage of Larce.—Where is law is signed by the speckers of both houses, and approved by the governor; it will be presumed to have been passed in anothermity with all the requirements of the Constitution, and to be valid, until the presumption is overcome by legitlanate proof, clear and convincing in its character: Larrison v. Provin, Atlanta & Dooster Railroad Co., 77 III.

Contraction of Bill of Lading-Liability of Common Carriors

Construction of Bill of Lading—Liebility of Common Curvises thated by Special Contract — However terms may be understood in their

ordinary sense, if the parties have attached other, or unusual, or arbitrary meaning to them to be derived from their fair interpretation in the contract, they have the right so to employ them. But to accomplish such purpose and to vary the common understanding, the meaning enght to be plain and free from reasonable doubt: McCog v. Eric & Western

Transportation Co., 43 Nd.

The plaintiffs sucd the defendants, who were common carriers, for damages sustained by the alleged negligenee of the defendants in transporting a cargo of corn, consigned to the plaintiffs, from Chicago to Baltimere. The bill of lading was a printed form with the blanks filled up, in which was stated "Received * * of * * the following packages (con-Jents unknown), in apparent good condition: Marks * * * articles: 25,000 bus. 25,000 bus. No. 2, Corn Pro. Philadelphia. Marked and numbered as per margin, to be transported by the Anchor Line, * * on the following terms and conditions, viz. : * * * It is further agreed that the Anchor Line, and the steamboats, railreads and ferwarding lines with which it connects, shall not be held accountable for any damage or deficiency in packages, after the same shall have been receipted for in good order by consignees, or their agents, at or by the next carrier beyond the point to which this bill of lading contracts. * * * It is further stipulated and agreed that in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for, during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual sustedy the same may be at the time of the happening of such loss, detriment or damage. * * And it is further agreed, that the amount of the loss or damage so accraing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property, at the place and time of shipment under this bill of lading," &c. Evidence was offered at the trial tending to show that the corn was receipted for, "in good order," by the consigness' agents at Baltimore: Held,

1. That it was intended by the exemption clause in the bill of lading, to protect the defendant from any damage or deficiency in any package where the contents were unknown, after the same had been receipted for in good order; but that it was not intended to be applied to the

"corn" in question, and did not admit of such meaning.

2. That common carriers may by special contract limit their liability as recognized by the common law, where there seems to be reason and justice to sustain their exemption. But where such is the case it ought to be by clear and distinct terms.

8. That if it were the design of the defendent that said clause of exemption should apply to "corn," it was not expressed with sufficient

clearness to proclude the plaintiffs from a recovery.

4. That under the clause in the bill of lading—which was the written contract between the parties,—prescribing the mode of estimating any loss or damage which the plaintiffs were entitled to recover by reason of the non-performance of the contract by the defendant,—there was no securion to recort to parol explanation, or to any course of dealing between the parties to enable the jury to according the extent of the damage:

CORPORATION. See Trust.

Directors—Liability for Fraud—Bill by Stockholder—Laches—Pricars.—Where directors of a corporation have so minmanaged its affairs as to be fraudulent, a bill may be maintained against them personally by a shareholder: Watta's Appeal, 78 Penna.

A shareholder, in such case, msy, under proper circumstances, inter-

pose for the protection of the corporation: Id.

The directors of a corporation for the sale of land rejected offers for the purchase of its land; although this was imprudently done, yet being a matter resting in their discretion, if without fraud, they were not responsible: Id.

The power to execute and insue bonds, contracts and other certificates of indebtedness belongs to all corporations, public and private, and is inseparable from their existence. The power to contract necessarily

involves the power to create a debt: Id.

The charter of a land company gave the directors power to dispose of its land by deed or lease; the power to mortgage land on a proper

escasion and for a proper debt is implied: Id.

The corporation owning a very large body of lands, had power by their charter "to aid in the development of minerals and other materials, and to promote the clearing and acttlement of the country:" *Held*, that the building of saw-mills and an hotel for the accommodation of those having husiness in connection with carrying out the prime object of the corporation was within its powers: *Id*.

Even if such expenditures were wires rires, stockholders knowing of them, and not objecting until long after their completion, could not com-

pel the directors to account for the moneys expended: Id.

When directors act benestly for what they exteem the best interests of the corporation, and do not wilfully pervert their powers, but only misjudge them, they will not be held to account for money expended in such case: Id.

When an act of directors is in excess of their authority, but done with a bond fide intent of benefiting the corporation, and a shareholder, knowing of it, does not dissent within a ressonable time, his assent will be presumed, and he cannot gainsay it; and when the act of the directors complained of is to be followed by a large expenditure, the shareholder should not only make his protest within a reasonable time, but should follow it up by active preventive measures: Ki.

It is against good conscionce that one having power to prevent should stand by and see his associates spend money which may result to his benefit, and afterwards charge them with it. His neglect to act at the

proper time effectually bars his right: Id.

Six years' emission to proceed would be a bar to an action against

directors for the misuse of the corporate property : Id.

The stockholders directed public sales of their lands, and that payment might be made in cash and in their bonds: Hold, the payment in bonds was equivalent to cush: Id.

Directors bought at the rales at fair prices, and the sales were conducted openly and fairly: Hold, the sales to them were valid: Id.

Proudulent laure of Stock.—If the directors of a railway company gratuationally give away certificates of stock, being a major part thereof, to

contractors building the road, for the purpose of giving them a controlling influence in the election of officers and the management of the road, a court of equity will declare the same void, especially where a part of the directors are interested in the contract with the contractors: Gilman, Clinton & Springfield Railroad Co. v. Kelley, 77 III.

Truster—Railroad Directors.—It is illegal for directors of a railway company to become members of a company with whom they have made a contract to build and equip the read, so as to share in the profits, and if they do, they will in equity be compelled to account for the profits realized: Gilman, Clinton & Springfield Railroad Co. v. Kelley, 77 18.

CRIMINAL LAW.

Self defence — If a party be assaulted in such a way as to induce in him a reasonable and well-grounded belief that he is actually in danger of losing his life, or suffering great bodily harm, he will, when acting under such approhension, be justified in defending himself, whether the danger be real or only apparent: Roach v. The People, 77 Ill.

DESTOR AND CREDITOR.

Colleteral Scentity—Lien.—The assignment of a collateral accurity to a creditor to hold for the security of his debt, establishes a privity of contract, which invests him with the ownership of the collateral for all purposes of dominion of the debt assigned: Hanne v. Holton, 78 Panne.

When the collateral is lost by the insolvency of the debter in it, through the supine negligence of the creditor, be must account for the last to his own debter: Id.

Plaintiff assigned to defendant a judgment against Jackson, the Hen of which expired September 1863, as collateral for money lent to plaintiff; defendant neglected to revive the lien; Jackson sold his land July 1864 and the judgment against him was lost: Held, that defendant was liable to plaintiff on the ground of negligence: Id.

Jackson, at the sale of his land, was solvent, and the judgment was collectible. He afterwards died insolvent: Ilcid, that the Statute of Limitations began to run from the time of the sale, not from the time when the lien expired: Id.

DEED.

What is Essentia to the Delicery.—To constitute a delivery of a deed, the granter must do some set putting it beyond his power to reveke. There can be no delivery so long as the deed is within his control and subject to his authority: Duer v James, 42 Md.

The delivery need not be to the grantee, but may be to a third party anthorized to receive it, or even to a stranger for the use of the grantee:

It is not necessary to prove a formal delivery; this may be inferred from the acts of the party without words, or from words without acts, or from both combined: Id.

EQUITY. See Attorney; Corporation; Water and Water-courses.

Enforcing Performance of Condition.—Where a father made a conveyance of all his lands to his five sone, upon the consideration that he was a way and the sone of t

was to have the use and control of the same during life, for his support and maintenance, and that the sons should pay their sister \$1000 as her share of the estate, and the sons took possession of the land and refused to give their father a life lease of the same: IIcld, that a court of equity would enforce the contract as made: Youkum v. Youkum, 77 Ill.

Injunction—Remedy for Violation of Contract.—The defendant agreed with a theatrical company to give them his services as an actor for a specified time, and agreed not to give his services elsewhere without their written permission. The agreement contained a stipulation to the effect that if he should break his engagement, he obligated himself to pay to the company a conventional fine of \$200, to be forfeited by any violation of the contract; and then provides as follows: "This sum of \$200 is already furfeited by any violation of the contract, and requires no particular legal proceedings for its execution." On a bill for an injunction, filed by the company against the defendant to restrain him from performing at another theatre, it was IIrld, that the complainants having fixed by their own estimate the extent of injury they would suffer from a non-observance of this condition in the contract, and having indicated that the only form in which they could reck redress and recover the stipulated penalty or forfeiture was a court of law, were precluded from resorting to a court of equity for relief by way of injunction, on the ground that a violation of this part of the contract would result in broperable damage and injury to them: Ilinka v. Concordia Esciety, 48 Md.

ERCAPE.

Permissive — Subsequent Discharge of Deleter under the Insolvent Loves.—A defendant arrested under a ca. so. was permitted by the sheriff's deputies, for a compensation, upon presenting himself at the sheriff's office every morning, to go at large from day to day until he was discharged upon giving bond to take the benefit of the insolvent laws:

Ileld, that this was a permissive escape, for which the sheriff was liable:

Hopkinson et al. v. Leeds, 78 Penns.

It is the duty of a sheriff to keep a defendant under a ca. ra. in safe and strict custody; if the sheriff allows him to go at large for the shortest time, either before or after the return-day of the writ, he is liable for an

cocape: Id.

It is not a defence that the prisoner voluntarily returned and surrendered himself to the sheriff, or that he was subsequently discharged

under the involvent laws: Id.

The attorney of the plaintiff in a ca as, has authority to concent to defendant's discharge from arrest; if he does, the sheriff is not responsible for an escape. To discharge the sheriff, the evidence of the concent should be clear, direct and positive: Id.

A prisoner under a ca. so. having been permitted by the sheriff to go at large, a subsequent amont of the plaintiff's attorney to his remaining

at large would not relieve the sheriff: Id.

ESTATURE. See Corporation; Insurance.

Collection of Money without Authority.—This was an application for todowns on respondents to pay over certain meneys collected in the sea under the linuar tex law. The assessment was made by the

township assessor instead of the village assessor, and the taxes had been paid over to the township by the parties assessed: Ileki, that the right of the relator to the tax is clear; that the village assessor might and should have made the assessment, and the tax should have been collected for and paid over to the village; but that his failure to do so can work no estoppel against the village in favor of the township; that the mere receipt of money by a party not entitled cannot of itself create any equity in his favor; that the township assessor in making an assessment he had no right to make was not the agent of the township, and not entitled to compensation for it; that though it is possible the village asseasor might have disregarded what was done, and made a lawful assessment himself, yet it is manifestly wiser and more proper for the village to sanction the collection and claim the money than to exerte litigation by new proceedings; that there are no disputed questions of fact involved requiring a formal trial, but the question to purely one of law, and that it would therefore be idle to send the case to a jury; that the fact that the township has used the money will excuse the present payment in money, but that the village is entitled to a township order Writ granted: The Pouple, on rel. the Village of Decatur, v. The Township Board of Decatur, B. C. Mich:

EVIDENCE.

Stamp.—A note was drawn by a firm to their own order, endorsed by them to one of the firm and by him endorsed to Cettrell. Before maturity Cottrell died, and the note was found amongst his papers unstamped: Ifeld, that the want of a stamp was not evidence that Cottrell had received the note without consideration: Long, Adm'r, v. Speneer & Co. 78 Penns

The Internal Revenue Act merely made the want of a stamp a disquali-Section of the instrument as evidence: kl.

After the death of Cottrell his administrator procured the collector to stamp the note: *Held*, that the note was to be treated as if stamped when made: *Id*.

Testimony by two of the defendants that the note was unstamped when perced to Cottrell, being as to a matter before his death, was imadmissible under the provise of the Act of April 15th 1869: Id.

Declarations by the administrator of Cottroll that there was nothing in his books and papers to show that any consideration had been given for the note, were irrelevant: Id.

FORGED INSTRUMENTS. See Negligenes.

FRAUDS, STATUTE OF

Promise to pry Debt of Another—Evidence.—Evidence to change a contract relation between plaintiff and a third party and to prove a promise to pay the debt of another as a new and original undertaking and not a contract of suretyship, must be clear and actisfactory; etherwise to will fall within the Statute of Frauda: Maseriy v. Mercur, 78 Penna.

On a judgment of annount the court below being better able to judge of the force of the evidence, the accounty of a clear and proponderating weight of evidence in favor of an absolute, original and personal accounts. In greater where the court of error is called upon to reverse the

judment of the lower court; it should plainly appear that the plaintiff had a case that should have gone to the jury : Id.

INSUNCTION. See Equity; Waters and Water-courses.

Specific Performance— Encertainty of Contract.— A bill was filed to restrain defendant from violating the following contract:

"Whereas, Caswell & Breinig have heretofore released Gibbs & Maxim from a contract for towing and delivering logs, now, in consideration thereof, I, Chancy Gibbs, do hereby agree that I will never tow vessels in competition with said Caswell & Breinig, or either of them. Dated Ladington, Michigan, this 19th day of May 1878.

(Signed) CHANCY (HBBN.

"I agree to same as above (Higned)

A. A. Maxim."

The bill prayed that the defendants be enjoined from towing vessels at the port of Ludington in competition with complainants, and from towing vessels into or out of said port no long as complainants were engaged in the same business and "furnished sufficient facilities for, and faithfully performed or offered to perform all such towing business at said port:" IIcId. that the question not only so to whether there was in fact any competition, but also whether complainants at the time were furnishing "sufficient facilities," and what would be considered sufficient facilities, must arise in every case of an alleged violation; that the difficulties in the way of enforcing an agreement of this uncertain and indefinite character were fully discussed in Blanchard v. D. L. & L. M. Railroad Co., 81 Mich. 43, which was referred to as decisive of this case, and an injunction was refused: Custell et al. v. Gibbs, & C. Mich.

INSURANCE.

Recital of Phyment of Premium—Estoppel.—Where a policy of insurance of a person's life recites the payment of the first quarterly premium, the insurance company will not be permitted to disprove such recital: Teutonia Life Ins. Co. v Mueller, 77 Ill.

Interpleader.

Holder cannot claim part of the Money.—Where a party owes a debt, or has a fund in his hands, and files a bill of interpleader against different claimants of the same, he will have no right to enter into a contest for a portion of the fund, as belonging to himself: Cogsacoll v. Armstrong, 77 III.

INTOXICATING LIQUORS.

Poreign Contract—Megal Preparation Set-off—Notice.—Roothke was seed for beer furnished by defendant in error, a corporation located in Milwankee. The beer was sold after verbal negotiations with an agent, carried on at Roothke's store in Saginaw City. The jury found the transactions were sales and not agency. Part of the beer was sent under the Enginew City negotiations, and the sale was held by the court below we been void under the Michigan liquor law. The remainder was

from Milwaukee on separate orders, held to be valid foreign con-Held, that as the verbal agreement made in this state was not sufficient under the Statute of Frauds to cover future orders, and as these therefore stood on their own merits, and the sales and shipments were in Milwaukee, the rulings on these were correct—as there was a contract made there which would have been valid at common law, and which must be presumed to be valid, under which these latter sales were made:

Roethke v. Brewing Company, S. O. Mich.

The court below refused to allow the money paid for the walswitzle purchases to be set off against the domand in suit for the rest: Ileb!, that this was error; that the statute providing for the recovery back of moneys paid for liquous sold in violence of law, as moneys received without consideration, places the limbility for such money on the same feeting as for any other money had and received, and that it was therefore as legitimate ground of set-off as if the plaintiff had collected it for defendant and failed to pay it over: Isl.

JUDICIAL BALES.

Fairness.—The greatest fairness is required of these intrusted by law to conduct judicial sales, and of those purchasing at such sains; and any agreement, contract or arrangement entered into on the part of the bidders, calculated to prevent competition at the sale, being contrary to public policy and a fraud upon the law, will vitiate the sale: Wilson v. Kellogg, 77 Ill.

LACHES. See Corporation.

LIMITATIONS, STATUTE OF. See Debtor and Creditor.

MALICIOUS PROSECUTION.

Probable Cause—Mulice.—Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty. It does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution: Il arphane v. Whitney, 77 III.

The term malice in a suit for malicious presecution is not to be considered in the sense of spite or hatred against au individual, but of moless animus, as denoting that the party is actuated by impreser and indi-

rect motives: Id.

MASTER AND SERVANT.

Negligence.—Where a servent of a mining company was killed by the falling of a rock from the roof of a common gangway in a coal mine, and it was sought to charge the company with negligence in not keeping the roof in a safe condition, it was Held, that notice to the superintendent of the dangerous situation of the roof was notice to the company; and if this was long enough before the accident to have given time to requir, the same was sufficient to fix negligence upon the company: Quincy Chal Co. v. Hood, 77 Ill.

NEGLIGENCE. See Master and Servant.

Railroad—Pire—Defective Engine.—In an action against a relicand company for burning a house, it was alleged that the fire was communicated by engine No 458, which was not in a proper condition: End, that the condition of that cogine and its management were all that was

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NEGLIGENCE. See Master and Remant.

Railroad—Fire—Defective Engine.—In an action against a relieved company for burning a house, it was alleged that the fire was communicated by engine No 458, which was not in a proper condition: Mild, that the condition of that engine and its management were all that was

If that engine was properly constructed, the company would not be liable, although the burning was occasioned by fire accidentally issuing from it: Id.

Evidence to prove defects in other engines of the company was irrele-

rant, and should have been excluded: Id.

On cross-examination, the inspector, who had been examined only so to 458, testified that he had sometimes found broken grates, but none within three years: Ilela, this answer was irrelevant; that the plaintiff was bound by it and could not contradict it by showing that broken grates had been found within that time: Id.

Rights and Liabilities growing out of a Forged Assignment of Certificates of Stock.—B. L. & Co., as private bankers, made a loan upon certain forged assignments of certificates of stock of the H. P. Ins Co. to the agent of the firm of D. & Q., of which the real owner of the cer tificates was a member, in ignorance of the forgery. These certificates were presented to the insurance company and cancelled, and a new certificate in lieu thereof issued in the name of and delivered to B. L. & Co. About a mouth afterwards the firm of D. & Q. failed, and notice was given to B. L. & Co. and to the H. F. Inc. Co. that the assignments were forged. On a bill filed by the assignee in bankruptcy of D. & Q against B. L. & Co. and the H. F. Ins. Co., to compel the former to deliver up the certificate issued to them, and the latter to insue a new certificate to the complainant, it was Held, 1. That B. L. & Co. must sustain the loss occasioned by the forgery, and had no right to throw it upon the meurance company; 2. That if the maurance company were guilty of negligence in issuing the now certificate without detecting the forgery, unless that was the occasion of the loss to B. L. & Co., it would not be sufficient to shift the less upon it; 8 That negligence, to operate as an estoppel must be the proximate cause of the loss; 4. That the insurance company having issued the stock upon the forged name to B. L. & Co., who had before treated it as a genuine paper, and to that extent misled the insurance company, B. L. & Co. ought not to hold them accountable for the less incurred by their own error, unless they sould make it appear that they might have avoided the loss but for the negligence or oversight of the insurance company; 5. That say negligouce on its part would not render it answerable unless that were the proximate cause of the loss: Brown, Lancaster & Co. v. Howard Fire Insurance Company et al., 43 Md.

Powen. See Corporation.

As a general rule a power to sell and convey does not confer a power to mortgage. Questions of this sort must depend on the parties as shown by the instrument: These v. Latrobe, 43 Md.

RATESCAR. See Negligenes.

Municipal Subscriptions.—Counties baring no power to contract with a railway company to subscribe to its capital stock, except when authorized by a vote of the people, it follows that the county authorities causet hold out any effect to such a company, prior to any vote, upon which the company has a right to soly: The People v. Car Ch., 77 III.

BET-077. See Intraconting Liquers. BEAMS. See Evidence. BEATUTS.

Construction—Provided Acts.—Whilst a statute is no. to be followed according to its literal terms, if it can be discovered that such was not the intention, yet the meaning must be accertained by a reasonable construction to be given to the provisions of the act, and not one founded on more arbitrary conjecture: Confoss v The State, 42 Md.

No man incurs a penalty nuless the act which subjects him to it is clearly within both the spirit and letter of the statute. Things which do not come within the words are not to be brought within them by construction; the law does not allow of constructive effences or of arbitrary punishment: Id.

Statutes should be interpreted according to the most natural and obvious intent of their language, without reserving to subtle or forced construction, for the purpose of either limiting or extending their operation: Id.

It is only in case the meaning of a statute is doubtful, that the courts are authorized to indulge in conjecture as to the intention of the legislature, or to look to consequences in the construction of the low. Where the meaning is plain, the act must be carried into effect according to its language, or the courts would be assuming legislative authority: Id.

STREAM. See Water and Water-courses. TRUST AND TRUSTER. See Corporation.

Trustee and Costui que Trust—Principal and Agent—Corporations— Transactions between a Corporation and its Directors governed by the Rule applicable to Transactions between Principal and Agent, de.— Burden of Proof as to a Transaction between Parties, where one bears a Piduciary relation to the other.—As between trustee and costul que trust, or agent and principal, the rule is inflexible that the trustee or agent cannot take the benefit of a transaction entered into in violation of his duty; or where the benefit claimed and the duty to be performed are inconsistent: Cumberland Coal and Iron Co v. Parich. 42 Md.

Directors and managers or corporations and other companies are within the rule which governs the dealings of trustee and cretui que trust, and agent and principal; such directors and managers are in fact trustees and agents of the bodies represented by them: Id.

In the case of directors of a corporation, there is an inherent obligation, implied in the acceptance of such trust, not only that they will use their best efforts to promote the interest of the shareholders, but that they will in no manner use their positions to advance their individual interest as distinguished from that of the corporation, or acquire interests that may conflict with the fair and proper discharge of their duty: Id.

The burden of press is upon a party holding a confidential or fiduciary relation to establish the perfect fairness, adequacy and equity of a transaction with the party with whom he holds such relation; and that too by proof entirely independent of the instrument under which he may claim: Id.

WATER AND WATER-COURSES.

Rights of Riperies Proprietors—Case of the Introduction of an Artificial Ropply of Water into a stream running through the land of

rien ewner to the enjoyment of a stream of running water in its natural state, in flow, quantity and quality, is incident and appurtenant to the ewnership of the land itself, and being a common right, it follows that every proprietor is bound so to use the common right as not to intertere with an equally beneficial enjoyment of it by others: Mayor of Bultimers v. Appeld, 42 Md.

As such owner he has the right to insirt that the stream shall continue to run as it was accustomed to run; that it shall continue to flow through his land in its usual quantity, at its natural place, and at its usual height:

H.

But there must be allowed to all a reasonable use of that which is common; and such a use, although it may to some extent diminish the quantity, or affect in a measure the flow of the stream, is perfectly con-

eletent with the common right: M.

It is impossible to lay down a precise rule defining the limits which separate the lawful from the unlawful use of a stream, to cover all cares; and the question must be determined in each case by taking into consideration the size of the stream, the velocity of the current, the nature of the banks, the character of the soil, and a variety of other facts; the true test being whether the use is of such a character as to affect meterially the equally beneficial use of the stream by others: Id.

An attempt to empty into a stream an artificial supply of water to the extent of 10,000,000 gallous in every twenty-four hours, is a user inconsistent with the common enjoyment of the stream by all other ripa-

rian owners: Kl.

verations litigation: Id.

And being an unreasonable and unauthorized use of the stream, an action will lie by the party whose rights are so invaded, even though he

may not have suffered any actual damage: Id.

The jurisdiction of the courts of equity in cases affecting the rights of riparian owners, is well established both in this country and in England; and rests upon the necessity of granting relief to prevent permanent and lasting injury, or where full and adequate relief cannot be had at law, or where it is necessary to prevent a multiplicity of suits and

The complainant's bill for an injunction to prevent the introduction of an artificial supply of water juto a stream flowing through his land, alleged, that he was credibly informed and verily believed that the intreduction of the proposed additional quantity of water would cause the stream to everflow its banks, render valueless his land, and cause great, continual and irreparable damages, &c. : Hehl, 1. That the averment that " he was credibly informed and verily believed," together with the statement of facts upon which his belief was founded, was sufficient; 2. That he was not obliged to wait until actual demage was sustained, nor was he bound to obtain the opinion of scientific persons as to the probable consequences resulting from this artificial addition of water; 3. That it would not be enough that the injunction should merely enjoin the introduction of the proposed additional supply of water in such a way, or to such an extent, as would cause the stream to overflow its banks, or would interfere with the ordinary use of the stream by the coinplainants: Jd.

AMERICAN LAW REGISTER.

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THE ACTION FOR CRIMINAL CONVERSATION.

I. NATURE OF THE ACTION.

BLACKSTONE says that "adultery or criminal conversation with a man's wife, though it is a public crime, left (by the law of England) to the spiritual courts, yet, considered as a civil injury, the law gives a satisfaction to the husband for it by the action of trespass vi et armis against the adulterer, wherein the damages received are usually very large and exemplary."

The actions of trespass and case are concurrent remedies for the injury; but Chitty, in his work upon Pleadings, says that, though it had been usual to sue in case, trespass was preferable, as the injury has always been described as committed with force, the law supposing force and constraint, the wife having no power to conrent: Chitt. Plead. 167. In some cases the loss of services of the wife to the husband may be alleged; but, unless the wife has been onticed away, it has been said, in the case of Yundt v. Hartranft, 41 Di. 12-17, that the real ground of recovery relates to the injury which the husband sustains by the dishonor of his bed, the alienation of his wife's affection, the destruction of his domestic comfact. and the suspicion cast upon the legitimacy of her offspring; the degradation which ensues and the mental anguish which the husband suffers. Loss of service is generally averred in the declaration. by way of aggravation of damages, but need not be preved; that is, it will not defeat the action if not proved: but where particular damages are claimed for loss of services, then they must be

When it is doubtful whether the criminal conversation can be proved, and the defendant has been guilty of enticing away or harboring the wife, it is advisable to add counts for such injury; but in such cases there must be an allegation that the party knew that she was the wife of the plaintiff, and it must be proved: 2 Chitt. Plead., note c. The action of crim. con. has always been and still is treated as one partaking more of a criminal than a civil character, and is a tort for which the defendant can be arrested and held to bail, and if found guilty can be taken on execution and imprisoned. The action can be maintained by the husband against a seducor of his wife, even if the wife is dead or dies pending the action. In England the action of erim. con. is now abollehed by positive statute, and the neclucer is made a co-respondent in all divorce cases, and damages may be recovered against him in the same action; and it should be so here, for if the evidence is sufficient to obtain a divorce on the charge of adultery with any particular person, it would be sufficient to sustain an action for damages against that person, and the matter can as well be adjusted by one action as by two.

To persuade or entice away or harbor a wife without a sufficient cause is actionable, and the old law was so strict upon this subject that if one's wife missed her way upon the road it was not lawful for another man to take her into his house unless she was benighted and in danger of being lost or drowned, but a stranger might carry her behind him on horseback to market or a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce. In England previous to the stat. 20 & 21 Vict., c. 85, it was customery but not necessary for the husband, learning the wife's adultery, to one at common law the particepe criminis, before proceeding in the ecclesiastical court, and then to plead in this court the verdict; which, if in his favor, was considered as tending to rebut any presumption of connivance. But in this country, such a verdict against a seducer could not be admitted in evidence against a wife in a sait for divorce, because such a verdict, although upon the same subject-matter, would not be between the same parties, and there is no recorded case in this country where it has been so admitted.

II. DECLARATION.

A declaration for criminal conversation need not state and set furth each particular act of adultery, and it will be sufficient if it is

alleged that it took place on or about a day specified, and on divers other days and times after that day: 2 Chitty 643.

It is unlike a bill for divorce, where time and place must be specified, and with all the uncertainties of human testimony no man can forcese the chances and accidents of a trial. And as to immeterial circumstances, great latitude should be allowed.

Bill of Particulars.

In the great case of Tilton v. Bescher, the first skirmish which took place, between the two contending parties, was over a motion made by the defendant's counsel to compel the plaintiff to furnish a bill of particulars.

The motion was first made before Judge NEILSON, and refused, on the ground that as the defendant had not excepted to the sufficiency of the complaint that he had no power to grant such an order. An appeal was then taken from his decision to what is known as the General Term of the Supreme Court, where several judges sit in bane, and was affirmed. A further appeal was then prosecuted to the Court of Appeals, the highest court in that state, which decided that Judge NEILSON did have the power but that it was a matter for the discretion of the court below, to be exercised in all descriptions of actions where the circumstances are such as that justice demands that a party shall be apprised of the matters for which he is to be put on trial, and it could not be assigned for error, whether the nici price judge did either grant or refuse it.

When the decision was promulgated an application was immediately made to Judge McCunz, who, after listening to most elaborate arguments, decided to grant the order under the following restrictions:—

- 1. The plaintiff should be limited as to his proof of specific acts of adultory, to those named by him in his bill of particulars.
- 3. That this order is not to be construed as prohibiting the plaintiff from introducing, on the trial of this action, testimony which may be admissible under the general rules of evidence, as to any acts other than the specific acts of adultary, declarations, writings, documents and confessions, in which alleged confessions no particular time and place shall have been referred to.

After this order had been entered, by a curious proceeding, which seems, to one not a practitioner in New York courts, utterly

an appeal was taken to the Supreme Court and the rulings of Judge MCCURE reversed, which ended the matter, and the case went to trial on the original complaint or declaration.

The arguments of the counsel who were engaged were very interesting, and are well worth a careful perusal. Those of Shearman, Judge Merrie, Beach, Evarte and Pryor are very able. Shearman, for the defendant, exhibits great research, and those of Morrie and Pryor, are especially able. The defendant's counsel contended, with great plausibility, that the charges made were of a most serious character, and that a defendant ought to know in advance what the particular acts complained of were, and the times and places when they were committed; but the plaintiff said such a course was but an ingenious method to compel them to show their hand to their adversary and to exhibit to them their proofs in advance, and that a party had no right to have an inquisitorial examination of his adversary's evidence, with a view to ascertain if perchance something cannot be found which will possibly aid him; that the law always considers sacred the rights of both parties to keep secret the preparations and means of attack and defence, and that if a litigant had a right to know what evidence his adversary intended to introduce against him that such a principle would include the brief of the counsel and all of the facts in the case, together with the instructions of the client, and further, that if a bill of particulars was allowed that the plaintiff could never step beyond the facts and times set forth in that . bill.

But Mr. Pryor presented the matter in the most striking light when he said, that the great fact, which must be borne in mind, "did the defendant commit the act of adultery and not where he did it, and that time and place were not the essence of the offence." Then passing beyond this he said, referring to Mr. Beecher, that "if he be innocent he is entitled to a vindication—not a vindication that he did not commit the adultery in Livingston street or on the 10th day of August 1868—but a vindication that he never committed the act at any time or at any place. A petty thief striving to escape the penitentiary may congratulate himself if he be let go by a flaw in the indictment or variance in the proof; but this defendant can be content and the world will be content with no such acquittal; what he wants, and what the world demands, is a settlement of the issue raised by the pleadings, a decision, a determination of the fact alleged by the pleadings, a decision, a determination of the fact alleged by the pleadings, a decision, a determination of the fact alleged by the pleadings, a decision, a determination of the fact alleged by the pleadings, a decision, a determination of the fact alleged by the pleadings, a decision.

defendant that he committed the act of adultery at all. When he gets that vindication it will be sufficient and satisfactory, but if he escapes from the fangs of justice by a variance in the proof or a defect in the indictment he will go a fugitive with the indelible mark of Cain upon his brow. So, then, it is due to the defendant, it is due to plaintiff, who, if the defendant is guilty, has sustained the most enormous wrong which one man can inflict upon another; it is due to the plaintiff that it shall be investigated by an impartial tribunal and determined by the country, not whether the wrong was perpetrated upon him one day or another, at one place or another, but it is his right to have tried and decided the great fact whether he has sustained the wrong at all. A bill of particulars, while it would advise the defendant, would limit the plaintiff in his evidence. To one it would be a shield, to the other a swerd."

III. PROOF OF MARRIAGE.

The first thing to be done on the trial of a crim. con. case is to prove the marriage of the plaintiff with the woman that he claims to be his wife, and with whom the adultery was committed; and it cannot be proven by cobabitation, but the actual fact must be proven by the minister who married them, or by any person who was present and witnessed the marriage. And it was laid down as an axiom by the old writers on the law of evidence, such as Starkie and Phillips, that bigamy and criminal conversation are the only two cases at common law which require such proof of the fact of marriage: Morrie v. Miller, 4 Burr. 2057.

Bishop, in his work on Murriage and Diverce, vol. 1, sect. 442, says: "The marriage has been required to be proved by evidence other than cohabitation and repute, in actions for criminal conversation and on indictment for polygony, for adultery, for ineset, and for loose and lascivious cohabitation;" see also sects. 445 and 6.

C. J. PARKER, in the case of Younger v. Foster, 14 N. H. 114-119, says: "Were not the authorities so strong it might be questioned whether this evidence of cohabitation and reputation enght not to be admitted in cases of erim. con., and in prescrutions for adultery and bigomy, for the simple reason that it has a legitimate tendency to prove the fact. If larceny, and rebbery, and murder, may be proved by circumstantial evidence, the inquiry naturally arises why cases of erim. con., &c., may not be so also. It is very clear that they may except in the matter of proof

of the marriage. Some writers say that a marriage in fact, while others say an actual marriage, must be proven, although there does not appear to be any difference in the meaning of these expressions."

In the case of The State v. Winkley, 14 N. II. 480, the court indertook to define these terms, and the conclusion arrived at was that they denote the marriage, as proved by direct evidence, as, for instance, by the testimony of witnesses who were present at the ceremony, in distinction from the proof by indirect evidence, such so reputation, cohabitation, acknowledgment, and the like.

The marriage can of source always be proved by a certificate of marriage, but in such cases you must prove the identity of the parties.

In Illinois a license to marry is to be obtained from the clerk of the county court, or they shall cause their intention to marry to be published at least two weeks previous to the marriage, in the church or congregation to which the partice, or one of them, belongs. Ministers of the gospel, judges and justices of the peace may perform the service of marriage, and then make a certificate, together with the license, to the county clerk's office; and where the marriage is celebrated according to the rules and principles of a religious society or denomination, and there is no minister, then the clerk or secretary of such seciety or denomination makes a certificate thereof and returns that, together with a license, if one has been issued, to the county clerk. This certificate is then resorded and carefully preserved, and such certificate or a copy of the same, or of the entry in such registry certified by the county clock under the seal of the county shall be received of the marriage of the parties therein stated: R. S. p. 696.

The fact of the marriage may be proved by the elergyman or other officer who selemnized it, or by any one who was present at the marriage, and now, in Illinois, by the parties themselves When the marriage is proved by the person who was present it should be shown that the person who selemnized at least purported to be a pricet or magistrate; and some courts held that it must be shown that such person had been in the habit of acting, or had acted in this capacity, and that they acted on this particular occasion, was not enough, although the law will presume that the person who selemnized the marriage under claim of authority

had such in fact, otherwise he would expece himself to the ponulties of the law.

In most cases, as where a person who selemnises a marriage purports to be a priest, the court holds that it must be shown that he had some accompanying badge of office, as, for instance, that he were the habiliments of a priest or had been known to efficiete as a minister of the gospel. In Maine, on the trial of an indistment for adultory, the witness having testified that he saw the coremony performed, but could not tell by whom and gave no description of the person performing it, whereby his official character could be indicated, the evidence was held insufficient, though the performance was followed by cohabitation. Church records are not evidence of marriage as in England.

IV. THE EVIDENCE OF THE OFFENCE.

The evidence in a crim. con. case is the same as that in a case of divorce for adultery, and can be proved by circumstances, and is generally so.

Adultory, say the books, is peculiarly a crime of darkness and secrety. Parties are rarely surprised in it, and so it not only may, but ordinarily must be established by circumstantial evidence. The testimony must convince the judicial mind affirmatively that actual adultory was committed, since nothing short of the carnel act can lay a foundation for divorce. But a fundamental principle, never to be lost sight of in these cases, is that the act need not be proved in time and place. Circumstances need not be so specifically proved as to produce the conclusion that the fact of adultory was committed at that particular hour or in that particular room, and Dr. Luszumerow said:

"It is not necessary to prove that the adultery with which a party is charged should have occurred at any particular time and place. The court must be estimated that a criminal attachment subsisted between the parties, and that opportunities occurred when the intercourse, in which it is estimated the parties intended to indulge, might with ordinary facility have taken place."

There is always an attempt made to show that the intimacy of the parties was consistent with innecessor, but Lord Browner case said that "courts of justice must not be deped." They will judge of facts as other men of discorrement, exercising a sound and sober judgment on circumstances that are duly proved. Again, he says that: "The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion, for it is not to lead a harsh and intemperate judgment moving upon appearances that are equally capable of two interpretations, neither is it to be a matter of artificial reasoning judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature, they are facts determinable upon common grounds of reason, and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties and artificial reasonings, and upon such subjects the rational and legal interpretation must be the same."

These points relating to the proof of adultery may be summarised as follows: adultery implies three things: First. The opportunity. Secondly. The disposition in the mind of the adulterer. Thirdly. The same in the mind of the particeps criminis.

And the proof of their concurrence may lie in detached testimony, no one witness being able to establish more than a single one or two of the links, or it may come in any other form. yet when we come to consider what particular circumstances are admissible in evidence, in distinction from what combination of circumstances should be accepted by a jury as sufficient, we find a very wide range. If perfect concord exists between married persons, the less likely is it that adultery will be committed. Therefore the terms on which the parties lived is a material circumstance in the issue; then the acquaintance with the defendant, and following that alienation of the affection of the wife, his meeting her, and riding or walking out with her, correspondence, the concealment of meetings of the paramour by the wife, watching for, and if they were shown to be very familiar with each other, and are seen to indulge in familiarities, it is considered that they would be much more familiar when beyond the reach of observation. To enumerate, or attempt to enumerate, what particular facts and circumstances are required or proper, would be useless and even impossible, for every case has its own peculiarities.

And I can only refer to the general rule upon this subject, which is about as well stated in the recent case of Daily v. Daily, 64 Ill. 323, as in any other. Said Justice WALKER, in that case, "there

is much testimony tending to establish the truth of the charge, but, as in all or nearly all such cases, there is no direct and positive evidence of the acts charged. In such cases the parties generally use every effort to conceal the act, and courts and juries are compelled to determine the question from the behavior of the parties and from a great variety of circumstances, either of which, when considered alone, would be insufficient to prove the charges, but when considered together may be, and frequently are amply sufficient to establish the offence. It, like all other charges, may be established by circumstantial evidence, and the evidence need only when considered together convince the mind that the charge is true."

If direct, positive evidence should be required, but few diverses would be obtained on this ground.

I need not stop here to enlarge upon the importance of circumstantial evidence, for whole treatises have been devoted to it; but Chief Justice SHAW said, in the Webster Murder Case, that in the absence of direct testimony, it would be injurious to the best interests of society if such proof could not avail in judicial proceedings. If it were necessary always to have positive evidence, how many criminal acts committed in the community, destructive of its peace and subversive of its order and scentity would go wholly undetected and unpunished. The necessity, therefore, of reserving to circumstantial evidence, if it be a safe and reliable proceeding. is obvious and absolute. Crimes are secrets. Most men camedi of criminal purposes and about the execution of criminal acts, scale the security of secreey and darkness. It is therefore nesestary to use all other modes of evidence besides that of direct testing provided such proof may be relied upon as leading to safe end eatisfactory conclusions; and, thanks to a beneficent Providents, the law of nature and the relation of things to such other, are so limited and combined together that a medium of proof is often fernished, leading to inferences and conclusions as strong as these rising from direct testimony.

Detectives' evidence and propriety of employing them.

The propriety of employing detectives to assertain whether on offence has been committed, was fully considered in the Mining cases and approved: The President and Trustees of the Found St. Charles v. O'Malley, 18 Ill. 412; Cross v. People, 47 Ed. 159; Grey v. People, 24 Id. 844; Bennett v. Walter, 28 Ed. You XXIV.—16

- 87. But in the recent case of Blake v. Blake, the majority of the judges of the Supreme Court in the same state condemned it with a good deal of emphasis and asperity. But three of the judges dissented from the opinion and held it perfectly proper. "The law imposes upon the husband," says Bishop, "the obligation to watch ever the morals of his wife, and protect her against associations which might expose her to hazard her purity; or, by lowering her standard of virtue, prepare the way for the approaches of the seducer; and a husband may, when he suspects her of infidelity, watch the movements and actions of his wife, and I am unable to see any objection in employing detectives or anybody else to ascertain facts which will disclose the truth as to the guilt or innocence of a husband or wife—not to get up or manufacture testimeny, but to ascertain facts."
- V. A wife is not a competent witness in an action brought by a husband against a third person for criminal conversation, and even if she is divorced she would not be competent: Res v. Tucker, 51 Int. 111.

VI. DEFENCES.

As to the matters which the defendant is at liberty to show, they are as follows:

1st. Consiverse and collusion at the offence.

Sd. The husband's bad conduct, which is admisted in mitigation of damages; as, for instance, that the husband abused her and turned her out of doors, and the bad terms on which they lived.

8d. The wanten manners of the wife, that she made the first advances, or that she has committed adultery with others before the commission of the offence with the defendant.

4th. The husband's criminal conversation with other women.

5th. His gross negligence and inattention in regard to her conduct with respect to the defendant, and any other facts tending to show either the little intrinsic value of her society or the light estimation in which he held it.

Consivence has been defined to be the corrupt concenting of a martied party to the conduct in the other of which he afterwards complains, and it is a bar to the action, because what a man has consented to be connect set up as an injury.

It is a thing of intent resting in the mind, and may consist in

a passive permitting of the adultery or other misconduct, as well as an active procuring of its commission.

Whenever a husband suspects his wife of infidelity to his bed, he may watch her and even leave opportunities open for her in order to obtain proof of her guilt, but for this purpose he must neither lay temptations in her way nor provide the opportunities. But, as Lord STOWELL said, "it is one thing to permit and another to invite; he is perfectly at liberty to let the licentiousness of his wife take its full scope, but he must not contrive the meeting or invite the adultery, and then decamp and give the opportunity." The burden of proof is of course on the party setting up the consivuance, and the testimony must be strongly inculpatory, admitting of no dispute. But there can be no connivance at any act without some knowledge of its existence.

Collusion is the next of kin to connivance, and is an agreement for one of them to commit the act, and is more frequently shown in divorce cases. Connivance may exist without collusion, but collusion is (generally) connivance for a particular purpose, and committance and collusion are bars to the action.

The state of the affections and feelings entertained by the husband and wife toward each other, prior to the adulterous intercouse, may be shown by their previous conversation, deportment and letters of the wife addressed to other persons.

The letters of the wife, in order to be admitted in favor of the husband, must have been written before any attempt at adulterous intercourse had been made by the defendant.

The infidelity or misconduct of the husband cannot be set up as a legal defence to the adultery of the wife, but in mitigation of damages only: 4 Esp., 237.

VII. DAMAGES.

It has not been the policy of the law to confine the recovery of the injured party to the precise amount of money which he has lost by the deprivation of labor ensuing from the injury. But the law has, in a more just spirit, allowed a recovery for injury to family reputation and anguish growing out of the injury. Nor is it true that the husband, being about from home, he therefore could have sustained no loss of service by reason of his wife being debauched. He had a right to her services in the nurture of his children, as well as a virtuous example to them by her. He had

the right to the teachings of a virtuous and not a depraved mother to his children. If he entrusted their care to a virtuous and undefiled mother, and a party corrupts and debases her, he thereby becomes liable for the neglect to her family and her example to her children, and the fact that the wife dies, does not deprive him of his right to a recovery: Yundt v. Hartranst, 41 III. 12, 18.

Dumages may also be increased or diminished by circumstances, as the rank and fortune of the plaintiff and defendant, the seduction of the wife founded on her previous behavior and character.

Again—In proof of damages, the relation of friendship, blood, confidence, gratitude and hospitality which subsisted between the plaintiff and defendant, may be shown.

Sedgwick and many other writers, including Greenleaf and Phillips on Evidence, lay it down as a rule that the amount of reparation in no cense is to be measured by the defendant's property, and evidence that the defendant is a man of large fortune is imadmissible. But that is not the law in Illinois, as that point was expressly decided in the recent case of Peters v. Lake, reported in 6th Legal News, p. 18.

ELLIOTT ANTHONY.

Cuscasa, Jan. 1876.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

SCHULTZ'S APPEAL.

Where an absolute estate is derived, but upon a secret trast assented to by the devices, either expressly, or implicitly by knowledge and silence before the death of the testator, a court of equity will fasten a trust on him on the ground of fraud, and consequently the statute of mortunais will avoid the device if the trust is in favor of a charity.

But if the devices have no part in the device, and no knowledge of it until after the death of the testator, there is no ground upon which equity can fasten such a trust on him, even though after it comes to his knowledge he should express an intention of conforming to the wishes of the testator.

A testator, being ill, sent for a serivener to draw a will, dividing his property among certain charities; upon being informed that it would be avoided by his death within thirty days, but that by inqueathing it absolutely to a man whom he could crust, the same result might be attained, he executed a will giving all his estate to T., who, he was confident, would execute his wishes, but who had no 'newledge of the will or to contents until after his death, which occurred within my days. T. ministed, on examination, that he felt a moral obligation to

devote the property to the charities which a witness present at the enceution of the will informed him were those meant by the testator. Hold, that the bequest to T. was good, and not within the provisions of the Mortmain Act of 90th April 1886.

CERTIORARI to the Orphane' Court of Montgomery county.

Frederick Schultz died in 1872. The paper containing the following residuary bequest was offered for probate us his will, and objected to upon the ground that it had been obtained by under influence: "As touching all the rest and residue of my estate, I give and bequeath the same to Rouben Yeakle, of Cleveland, Ohio, and his heirs and assigns for ever." An issue devices us non was directed, and determined in favor of the validity of the will, which was then admitted to probate.

Upon the filing of the executor's account, there was found to be a balance of \$10,048, after payment of debts. Before the auditor appointed to audit this account, there appeared the next of kin of testator to claim that this balance should be distributed according to the intestate laws, because the will, though in terms an absolute bequest to Yeakle, was an attempt to evade the act of 26th April 1856 (Purd. Dig. 1477, pl. 22), and to create a charitable trust. The auditor reported the facts (which are sufficiently set forth above and in the opinion), and a decree awarding the fund to Yeakle. This report was confirmed by the court below, and the next of kin appealed.

- C. Munsicker and G. R. Fez, for appellant.—By this will the testator attempted a fraud upon the law. The English doctrine, that parol evidence is inadmissible to vary or contradict a written will, has been much modified in Pennsylvania: Rearisk v. Surfacture, 1 Jones 238; Hoge v. Hoge, 1 Wright 168. The elder English authorities are conclusive that an attempt like the present to evade the statute of mortmain would have been thwarted: Beeen v. Stathem, 1 Edon 512; s. c. 1 Cox 16; Shelford on Mortmain, sect. 148–147; Willard v. Hauthern, 2 B. & Ald. 96; Bee v. Wright, Id. 721. The late English cases relied upon by the court below have never been recognised in this state, and are an abandonment of the earlier doctrine.
- B. M. Boyer, contrit.—The Act of 1866 is a copy, in principle, of 9 Geo. II., c. 36: McLean v. Wade, 5 Wright 206. Under this act the cases clearly establish the principle, that if there is no trust which equity could enforce against the legates if the will had been made in accordance with the re-risk.

there is no frond upon the law. The gift is the absolute property of the legates; if he devotes it to charity it is his own gift, not the gift of the testator—and cited Adjington v. Cann, 8 Atk. 144; Mucklestone v. Brown, 6 Ves. 52; Strickland v. Aldridge, 9 Id. 516; Lome v. Ripley, 8 Sm. & Gif. 48; Paine v. Hall, 18 Ves. 475; Walgrave v. Toble, 2 Kay & J. Ch. 818.

The opinion of the court was delivered by

SHARSWOOD, J .- The very able and exhaustive epinions, as well of the auditor as of the learned court below, have relieved us from an examination of the English decisions upon the mortmain act of that country. They undoubtedly throw a clear and strong light upon the question presented upon this record. They establish two positions: 1st. That if an absolute estate is devised, but upon a secret trust assented to by the devises, either expressly, or impliedly by knowledge and silence before the death of the testater, a court of equity will facten a trust on him on the ground of frand, and consequently the statute of mortmain will avoid the device if the trust is in favor of a charity. But, 2d. If devices have no part in the device, and no knowledge of it until after the death of the testator, there is no ground upon which equity con fasten such a trust on him, even though after it comes to his knowledge he should express an intention of conformity to the wishes of the testator.

The latter proposition applies directly to the case now before us. Reuben Yeakle, the legated named in the will, was not present whom the instrument was executed. He had no communication with the testater directly or indirectly upon the subject. The testater had long intended to leave his estate for charitable purposes. On his death-bad he sent for a serivener, and expressed to him his wish to have his property so disposed of after his death. He was informed that if he should die within thirty days such a disposition would be ineffectual, but that he might make an absolute bequest to some individual, upon the confidence and belief that when he should be informed of his wishes he would, of his own accord, carry them out. This plan was adopted, and, upon the suggestion of one of the by-standers, Reuben Yeakle, the hishop of the church to which decodent belonged, was chosen by him.

It is clear, not only from the evidence, but from the verdict of the jury in the issue of devices of non, that no under influence was exercised to precure the will. It was the testator's own free and voluntary act, and he was "told he could dispose of his preperty to a particular person unconditionally, and if that man would do it then he could put it to those places where he wanted it; but that would be entirely at his option; he could do it or not." Reuben Yeakle was not informed of the will until some time after the death of the testator. When informed of it he declared his intention to appropriate the money as the testator wished it to be. He said, when examined as a witness before the auditor, "I have not seen the will, but if it gives me the absolute right to the property without condition, I should consider that I had the legal right to de with the property as I pleased. I draw a distinction in this case between the legal and moral right."

We are unshaukled by authority on this question. The English precedents upon the construction of their statute of mertmain are not binding upon this court, and with us the question is an entirely new one. By the 11th section of the Act of Assembly of April 26th 1865 (Pamph. L. 382), it is provided that no cotate, real or personal, shall be easier be bequeathed, devised or conveyed to any body-politic, or to any person, in trust for religious or charitable uses, except the same be done by doed or will attested by two credible, and at the time disinterested, witnesses, at least one calcular month before the decease of the testator or alienor, and all dispositions of property contrary herete shall be veid and go to the residuary legates or devisee, next of kin or heirs according to law.

It seems very clear that the bequest in the will of Frederick Schults to Reuben Yeakle is not within the words of this statute. There is nothing in the circumstances to facton a trust upon him. The statute out of the way, the charities intended to be benefited would have no claim, legal or equitable, to enforce payment by .him to them. He would, in the eye of the law, be guilty of no frand, legal or equitable, either against them or the testator, if he should even at this day change his intention and apply the mesey. to some other use. Being the absolute owner under the will, the declaration of his intention would not be binding upon him. It is not, therefore, in the words of the statute, a bequest " to a bedypolitic or to any person in trust for religious or charitable uses." Had Roubon Youkle been present when the will was executed, or the object of the bequest been communicated to him before the testator's death, and be had held his pence, there would have been some ground for flatoning a trust upon him or enelgicia, as in

Hoge v. Hoge, 1 Watts 168. But nothing of that kind can be pretended here.

It has been contended, however, very strenuously, that as Edward Schultz proposed Reuben Yeakle to the testator as the man, the acceptance of Reuben Yeakle of the bequest recognised Edward Schultz as his attorney, and ratified whatever he had said and done. They urge the maxim, emnis ratihabitic retretrabitur et mandate equiparatur.

It is very ingenious contention, but, unfortunately for the appellants, there is nothing in the evidence upon which it can be built. Edward Schults did not undertake for Rouben Yeakle. He gave the testator no assurance that he would accept and carry out his intention when made known to him. He says: "I proposed Remben Yeakle, so far as I remember, as the man. Frederick then agreed to Rouben Yeakle. Rouben Yeakle was considered to be an honest man, and it was for this reason he was taken, and because he was acquainted with these societies mentioned. As far as I can recollect I said that through Yeakle his desire could be carried out in the distribution of his property. The object was to carry out the wish of Frederick in that way. There was a chance to carry it out in that way if the legatee was willing, and Rouben Yeakle was selected because it was thought he would agree to it."

There is nothing in all this which indicates any promise or assurance by Edward Schultz to the testator that Reuben Yeakle would accept the bequest in trust for the charities. There was the mere expression of an opinion, concurred in by the testator, that when the legates came to understand the object and purpose of the bequest to him, as an bonest man he would carry out the intention of the testator.

It is urged, however, that this whole plan is nothing but a contrivence to evade the statute. No doubt such was the intention of the testator. It is said that it is a fraud upon the law, and that the bequest ought, therefore, to be declared void. But that overlooks the fact that the absolute property in the subject of this bequest was vested in the logatee, and that he is entirely innocent of any complicity in the fraud of the testator. If the statute is practically repealed by this construction it is evident that it must be for the logislature to devise and apply a remedy, not the judiciary, whose previous is not fue dare, but fue dicere.

Decree affirmed and appeal dismissed at the cost of the appellants.

We are not surprised that the party against whom this decision was made, and probably many others, should look upon it as leaving open a mode of escase from the statute which looks very much like an evasion, and one which neght to receive no countenance from the courts. But after caroful study of the decision we confess our inability to comprehend how it enaid have been neherwise. Indeed we do not see that the legislature could, with any proper regard to the freedom of testators in disposing of their estates by will, have made may special provisions against bequests of the character in question in the principal case. It was nothing more than giving the estate to the devices sheelutely, with no trust whatever, and no communication with him. The argument and the English cases show: Arst, that such a bequest made in trust for the illegal object is equally roid, as if made directly to an institution of the character specified in the statute: Arichland v. Abbidge, 9 Vesey 516-; secondly, that it is not required that the trust should appear upon the face of the will, but that it may be shown by extrinsic evidence: Dec d. Willard v. Hauthorn, 2 B. & AM. 96; thirdly, that by the English law, not only the illegal trust is avoided, but the devises is compelled to disclose it, and to stand as trantee for those entitled to the estate, independently of the illegal hoquest: Ites v. Wright, 2 B. & Ald. 731. And it is equally well suttled, that it is not required there should have heen 'any express contract to execute the trust on the part of the trustee; the more expectation and understanding on the part of the testator, that the estate would be applied by the trustee according to his wishes, if this were made knows to the trustee, the concent to accept the bequest, knowing the ground of the testator's estion will be sufficient

to create the illegal trust. It may therefore seem surprising to some, that when all these facts exist in the present case except the knowledge and accent of the trustee, before the decease of the testator, there should be any legal difference in the result, especially as the trustee now avows the purpose of applying the estate according to the wishes of the testator. The case no doubt has, to unprofessional persons, comething of the appearance of an evasion of the statute; which in one sense it is, since that was the purpose of the testator and the result preomptishes it. But it is not accomplished through any legal force of the will. The devises is not a traitee in any sense, and may do with the estate as he chooses. It is a clear gift, over which the law has no control. He may do what he will with his own and it will be no violation either of the statute or any other lew. The point of decision may be somewhat narrow, but is clearly sound and in accordance with the latest Eaglish antherities: Messkins v. Allen, L. R. 10 Eq. 966; Jones v. Bredley, L. R. SCh. App. 365.

In the very recent case of Krarick v. Cale (not yet reported), the Sepreme Court of Missouri, having before it a somewhat similar attempt to evade the mortmain act, reached a different result upon the facts. In that care the testatrix made a will, leaving her property to Archbishop Konrick for the bounds of the Catholic Church. Upon the adoption of the Constitution of 1955. which prohibits any device or bequest for the support, use or bounds of any tainister as such, or any religious sout. testatriz made a new will, devicing the property to Peter Richard Keerick, as an individual, absolutely, without naming my trust. The court held that this was a froud on the law and void.

But the decision is not in applies with

the principal case, as Arabbishop Kenrick knew of the devise during testatrix's life, and there was evidence that he had declared he would carry out her intentions, and that such declaration was reported to her. The very case

arose therefore which is put by Judge SHAMMWOOD as one in which the court would fasten a trust on the devices, and therefore the mortmain act would operate.

L F. R.

Supreme Court of Verment.

THE STATE OF REL. JOHN B. PAGE r. J. GREGORY SMITH OF AL.

The fact of merger depends largely on intention, and this rule applies to a case where a corporation purchases shares of its own stock. The purchase suspends the right to vote on the shares, and may be a merger if so intended; but if not so intended, it is not a merger, and the presumption is that the corporation does not jutend a merger, but to hold the stock as assets, or to sell and reissue it.

A quorum of the directors of a corporation are competent to not within the scope of their powers and to bind the corporation, although the meeting was not regularly called and there was no notice to the other directors.

A sale of the company's shares of its own stock, tende at such a mosting of the directors, if made bend side and for full value, and for the purpose of raising money to meet an urgent necessity of the company, passed a good prind facie to the shares, and could only be set saide for cause, upon a direct proceeding for that purpose. Any director or stockholder desiring to avoid such sale, must proceed at once to dispute it in legal form; acquiescence until the consideration has been appropriated to the benefit of the corporation, is a ratification of the sale.

If the sale is otherwise valid, it is not vitiated by the fact that the motive of the purchaser and of some of the directors was to enable the former to vote upon the shares in a certain memor at an approaching election of corporate officers.

Where new stock is issued which is to share in profits with existing stock, all the holders of the latter have an equal right to subscribe for their proportionate part of the new stock, but this rule does not apply to original stock bought to by the corporation and hold as assets, and sold for the payment of liabilities or for, the general banedt.

MOTION for leave to file an information.

In April 1878 cash subscriptions were made to the capital stock of the Central Vermont Railroad, which were accepted by the commissioners and the stock allotted to the several subscribers. In May the company was organized, and in the same month it was appointed by the Court of Chancery receiver of the Vermont Central and Vermont and Canada Railroads.

Some of the subscriptions had been made by one Park in the names of parties who subsequently repudiated his authority and sufficient to accept the shares, whereupon Rark assumed them himself the shares were entered on the stock ledger in his name.

In January 1874, having been advised that they could not cancel these subscriptions, the directors purchased the shares for the company, and had the shares entered in the company's name.

On May 18th 1875, a directors' meeting was called by telegraph, for half past one o'clock at Bellows Falls. This was adjourned for want of a quorum, until four o'clock the same day, on the directors' car, then on a trip for inspection of the road. At four o'clock, a quorum being present in the directors' car, a vote was passed for the sale of the shares held by the company to Langdon and Millis, who were already large stockholders. The shares were paid for by the parchasers and transferred on the company's books on the morning of May 19th, and the purchase-money was appropriated by the directers to the payment of a debt of the company then due and urgent. To raise funds to pay this debt was the reason assigned for the sale of these shares by the directors. On the same day, however, May 19th, there was an election for directors of the company, and it was charged in the present petition that the respondents were elected directors by the votes of Langdon and Millis upon these shares (amounting to 2850), and that the said votes were illegal and the election void.

Daniel Roberts and E. R. Hear, for the relater.

B. F. Fifield and L. P. Poland, for the respondents.

- 1. Corporation may buy its own stock and sell again: City Bank v. Bruss, 17 N. Y. 507; Williams v. Manufacturing Co., 8 Md. Ch. 451; Robinson v. Beall, 26 Ga. 28; Taylor v. Miami Co., 6 Ohio 219; United States Trust Co. v. Harris, 2 Boaw. 90.
- 2. The sale was legally made, and at a legal meeting. A meeting regularly called for one place and having no quorum may adjourn to a different place: 8 Cowen 286; I Selden 22. Even if there was irregularity in this adjournment the annual inspection trip of the directors in their car is a regular business meeting. Failure to notify the others not present in the morning will not make the meeting illegal: Bank v. Railway Co., 20 Vt. 169.
- 8. There was no pre-emption right in the other stockholders as to these shares: R. M. Chariton 260; 8 Md. Ch. 418.
- 4. The sale was in good faith to raise money for a debt of the company. Even if there was another incidental motive it is of no consequence. The motive of a legal act is immeterial: South

The opinion of the court was delivered by

REPLIELD, J.—This is a petition of the states-attorney for Franklin county for leave to file an information in the nature of a writ of que warrante against the respondents for usurping and exercising the rights of directors of the Central Vermont Railroad. A rule to show cause having been obtained and served on the respondents, the question now comes up whether this court will grant the leave asked.

I. A preliminary question has been discussed, whether, if insufficient cause be shown and leave is granted, a judgment of custer will be awarded as a matter of right, or as a matter of course. It is not denied that at the time our statute was enacted, and down to the present time, the practice was settled and uniform in the courts of England, that after leave was granted and the information filed, the respondents had time and opportunity to plead to the information. The nature of the application is summary and requires speed, and the court will see to it, that there be no needless delay. The 4th sect. of the Statute of Anne required "proceeding at the most convenient speed that may be," and "an appearance and pleading as of the same term at which the information shall be filed." But the practice in the English courts under that statute was, when the information was filed, if there was not voluntary appearance, to require such appearance by venire facias, or compel it by distringue. The rule requires the respondents to show cause why an information should not be filed against them; if they omit to show cause, as they may, the rule becomes absolute, and the information is filed.

In the People v. Robinson, 4 Cow. 07, the respondent had been adjudged guilty upon default of appearance to show cause, and custer awarded. The court held the judgment irregular and without due process of law, and set it aside as irregular and void. It is noticeable as having been ably argued by the attorney-general on the one side, and John C. Spencer on the other, and thoroughly sifted by the court. We think when an information is allowed to be filed, it is the duty of the court to fix some time, ordinarily during the same term, for the respondents to appear and plead; and if they do not voluntarily do so, their appearance will be compelled by due process of law. In State v. Hunton et al., 28 Vt. 504, the court, BENNETT, J., questioned the propriety of rendering final judgment of the guilt or innocence of a party on a rule to

show cause why an information should not be filed, and maintained that the rule of practice was otherwise, unless the court should of its own motion institute a new and independent practice of its own. But in that case no question was raised, and, by mutual consent, the parties submitted the whole case upon its merits.

In State v. Bradford, 82 Vt. 50, the respondents disclaimed any right or title to the offices in question; and the pretended and de facts corporation appeared, but made no answer, and asked to have the case decided upon the proofs of the states-attorney. There was no relator upon the record, as the court said should have been. The proof being ample, and the parties appearing and making virtual confession of the truth of the allegations and disclaimer of title to the offices, the court, by implied consent, made an order for the dissolution of the pretended corporation and the custer of the disclaiming officers.

The statute gives, merely, jurisdiction to this court of these prerogative writs, and prescribes no forms or rules for proceedings, but, by manifest implication, adopted the function and manner of use of the proceedings then uniformly practiced in the common-

law courts of England.

The analogy of practice in certification is anged upon us. The analogy is not obvious. The inquiry in the application for certification is based on the record, and is a substitute in accions matters for the writ of error, which applies only to common-law procedure. The court examines a copy of the records upon which it is claimed that an erroneous judgment has been rendered in the inferior court; and if the court finds error, it will order the record to be certified into this court, and render thereon such judgment as should have been. The record imports verity, which meither party can dispute.

II. This proceeding is criminal in its form, but civil in its mature, and is addressed to the judicial discretion of this court. It may be allowed or denied, in consideration of rights and consequences, the condition of the property, and its ewners, and its relation to the public.

The case discloses that the said corporation has, by the court of chancery, been made receiver, and holds in trust the Vermont Control and Vermont and Canada Railroads, and is operating, under leases, several other railways in this and other states. The trust duties thus imposed are active and executive in their nature, in-

volving important duties and responsibilities, both to the cestui que trust and the public, and incurring, necessarily, from day to day, large liabilities in intricate and often complicated transactions in the administration of the trust, which, from the nature of the case, must be largely outstanding and unsettled. One of the incidents of a receivership is a bond, commensurate with the magnitude of the trust, approved by the court of chancery, and to respond to that court for the property, its income, and for all laches of administration. Such bond is presumed to have been furnished by those who have assumed the duties, and have been the active administrators of the trust. If the present incumbents should be ousted, they would have the right to require that their personal liability, by bond or otherwise, should cease with the ouster; and the chancellor would doubtless require new bonds, to respond for any laches of administration. How far personal character, capacity and responsibility, induced the appointment of this corporation as the receiver of this large property and executive trust, is known only to the chancellor. The Court of Chancery has absolute control of the trust and its administrators, and may so temper any order as to restrain wrong and insure justice, while this court has no power, upon this application, but to grant or refuse the petition. Without discriminating as to the fitness or unfitness of men for the administration of so important a trust, it is easy to foresee that it is possible for complicated questions to arise between the outgoing and incoming directors as to liability and responsibility, and for a litigation to spring up, subjecting the trust to new burdens, without benefit to the parties or the public. We have no warrant for saying that such mischief would necessarily follow: but to some extent it is possible, and perhaps probable; and though not of controlling weight when there is satisfactory proof that the office has been usurped by force or fraud, yet they are proper matters for consideration in the exercise of that judicial discretion which the petitioners invoke.

III. The right of the respondents to hold and exercise the office of directors of this corporation, depends upon the legality of the 2350 votes cast by Langdon and Millis on the stock in question. If such votes were lawfully east, the respondents were duly elected directors, etherwise not.

Wairing, for the present, all consideration of the alleged conspiracy on the part of the respondents, to forestall by fraud the

majority of the stockholders in the election of the 19th of May last, and assuming that the transaction had wholly occurred six months before, and without reference to an immediate election, we inquire whether Langdon and Millis stand as purchasers and owners of such stock in this corporation

Mr. Park and associates in New York had agreed with Governor Smith and associates in Vermont, that they would subscribe for 20,000 shares of stock in this corporation, in certain agreed preportions. Park, in executing his part of the contract, signed in the names of two friends in New York, 1500 shares without authority, which they repudiated. Whereupon Park assumed such subscription as his own, and the stock was entered upon the books of the corporation as belonging to Park. It is urged that this stock having first been subscribed in the name of Myers and McKinney, was their stock, and that Park, showing no written assignment, had no title or property in it. But Myers and McKinney repudiated the subscriptions, for the reason that Park was without authority to bind them by such contract. Park having subscribed for stock, by an assumed agency not founded in fact, failing to bind the principal, bound himself. The five per cont. paid by Park was then placed to his credit by the corporation, and the subscriptions placed on the books as a subscription by Park in his own right. Park was then not only the equitable owner, but the original subscriber for the stock. The corporation had been made the receiver of this large property, upon the representation that 20,000 shares of stock had been bend fide subscribed. Park claimed that the corporation ought to relieve him from helding and carrying the stock subscribed in the name of Myors and McKinnoy; and certain other parties made similar claims. For certain rescons-and we have no right to assume that such reasons were inadequate or improper—the corporation purchased 2850 shares of such stock, and placed it on their books as stock belonging to the corporation, like other assets. It is claimed that thereby unid stock became merged and extinguished. The intent of the parties, and especially of the corporation, is important in determining the character of such transactions.

The corporation had no right to diminish its capital stock, and especially so under the circumstances of its receiverable. And the evidence concurs, that the corporation purposed, under advise of council, to hold the stock thus purchased as not morned, but out-

sisting as assets on the books of the company. We think the legal effect of such transfer of the stock is fairly and correctly stated by the court in Williams v. Savage Manuf. Co., 8 Md. Ch. Dec. 461, to which we have been referred by counsel for the petitioners; and in the case of Bank of Columbus v. Bruce et al., 17 N. Y. 507, referred to by the respondents. In the latter case, SELDEN, J., says: "It might or might not have that effect-extinguish the stock—at the option of the company. I think some manifestation of such intent should be proved, to produce that result." And again he says: "I see nothing to prevent the re-issue and sale by the company of the stock so transferred; and, in the absence of any proof to the contrary, the presumption is that the directors intended to act within the scope of their powers by selling the stock en hand, instead of issuing new stock, which they had no power to create." In the former case, the chancellor says, after reviewing the cases on the subject: "But it does not follow that though the shares transferred to the corporation are merged for the time being, that they may not be subsequently revived; * * * and whatever may be the temporary legal effect of the transfer, it has always been supposed, and the practice has always been with such general understanding, that they were authorized to revive the stock when they saw fit to do so." The sale and transfer of stock, If done by proper authority, and if it was actual and not colorable, and not affected by any secret trust, if a bond fide and absolute sale, vested in the purchasers the title to the stock, with all the incidents, including the right to vote upon it.

IV. Was the property sold and transferred to the purchasers by such authority as should bind the corporation? We think the majority of directors whe assembled on the directors' car and passed the resolutions authorizing the sale of this stock, to meet a liability becoming due on the first of June after, cannot, lawfally, be claimed as organized under the call of the clerk to meet at Bellows Falls, at an earlier hour of the same day. If we should held that the call of the clerk by telegraph was in accordance with the by-laws, and the time sufficient, we think the attempted adjournment by a minority, to a point fifty miles distant, was irregular, and did not transfer the place of legal venue under that call to White River Junction. But a quorum of the directors, regular in form, assembled on the cars, and by resolution, authorized the sale of this stock, and under that anthority the stock was sold,

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and, as the proofs stand, for adequate and full consideration received by the company.

In Bank of Niddlebury v. R. & W. Railread Co., 30 Vt. 100, the court held that the action of a majority of the directors of a corporation, without any notice to the other directors, if within the scope of their authority, was legal, and bound the corporation, and the court says, that " if the authorized agents of the company have extended its business beyond the strict limits of their functions for which the charter was granted, the company has been bound by the extension, unless the corporators interfere to restrain such extension at the carliest moment." Bee also Stark Bank v. Union Potter Co., 34 Vt. 145.

The reilroad provisions of our statute provide, p. 216, sec. & "That the government and direction of the affairs of every such corporation, shall be vested in a board of not less than five, * * * and a majority of the directors shall form a board, and shall be competent to transact the business of the company." . By the express language of the statute, a majority of the directors are constituted a board, with full authority to do what all the directors when assembled could do in "the affairs of such corporation and in the transaction of the business of the company." In Edgerly v. Emerson, 8 Foster 555, a very well reasoned case, it was beld that when a majority of bank directors are by the statute constituted "a board for the transaction of business," that "such board, when assembled, pussess all the powers of the entire board of all the directors." The statute of New Hampshire declared that "no less than four directors shall constitute a board for the transaction of business." In that case, BELL, J., says: "There was before no dif-Sculty except as to the point of notice, and the only meeful effect of the statute provision relative to a quorum, or the powers of a majority, is, to give them the authority to act in the absence of others and without notice to them. We are therefore of the opinion that when the quorum of a bank most and units in any determination, the corporation is bound, whether the other directors are or are not notified." We think that the vote of the majority of the directors thus assembled, was a lawful vote of the "board of directors competent to transact the business of the company;" and if this transfer of the stock was not a transfer merely, but a sale, beneficial to the company, and bend fide, it vested in the purchaser a title to the stock; and though the "beard" of directors

that anthorized the sale, was under no regular call, and the two members of the finance committee who effected the sale, may have been personally interested, and moved by partisan influence, yet, if the stock was the principal available assets to meet an impending liability, and was sold for full value, the sale was, at most, roidable only, and could be impeached for cause only, on the seasonable metion of the party rining to be injured.

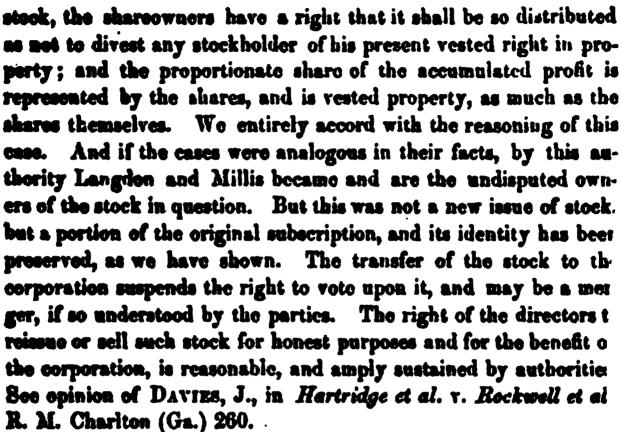
The case discloses that the relator was not only a large stockholder, and representing, as he claims, a majority of the stock, but was himself elected one of the directors on the 19th of May, and had been, up to that time, vice president, and chairman of the Enance committee. He was aware of the resolution of the directors, and the claim therein that the stock was sold and the money paid to meet the instalment due by contract in a few days for the purchase of the property of the Vermont and Canada Railroad Co. Whether it was necessary to sell this stock, is left on the proof to the parties to the sale, who aver that it was necessary, and that the sale was actual, bond fide, made for that purpose, without any secret trust, or understanding that the purchase-money was to be returned, or that the purchasers had any other equivalent for their money than the stock thus purchased. So far as this case discloses, there is no question that the money paid for the stock went to the use of the corporation; and all parties have acquiesced in the sale, unless this preceeding may be supposed to have brought it in question. The relator could, then, clost to challenge the validity of the sale and take proceedings to avoid it, and demand that it should be annulled by a return of the consideration to the purchasers, or he could acquiesce in the sale, and allow the consideration to go to the use of the corporation. But if a member of a corporation and associate director claims that the directors, as agents, have exceeded their functions in colling property in derogation of the rights of the corporation, that claim must be seasonably asserted, in a manner that shall bind the parties to such sale: acquiescence would confirm the sale; and allowing the consideration to be appropriated to the use of the corporation, would adopt and ratify it.

It may be claimed that this proceeding to cust certain directors on the ground that they were elected fraudulently by votes upon this stock, is, virtually, a proceeding to avoid this sale. The purchasers are not made parties; Langdon's election is conceded:

Millis never was a director, and claims to be a stockholder by virtue of the ownership of this stock. Whatever may be the order of the court in this case, it could have no effect upon the rights of Langdon and Millis. Suppose a new election abould be ordered, as under statute law is the practice in many of the states, and Millis offering his votes on this stock, should be challenged. It could not be claimed, upon any evidence or suggestion in this case, that if the purchase of this stock was voidable, it had not been fully confirmed by acquiescence, and allowing the purchasemency to go to the use of the corporation.

V. It is insisted that there was a pre-emptive right in all the stockholders to perchase a proportionate share of this stock. are referred to Gray v. The Portland Bank, 8 Mass. 804, and Ang. en Corp., secs. 554-5. The two sections in Angell seem entirely based upon the former case, and the text is but a quotation from the opinions of SEWELL and SEDGWICK, JJ., who gave the opinions of the court in the case. In that case the plaintiff Gray was a large owner of stock in a banking corporation under a charter that authorized the corporation to issue stock, not less than \$100,000, nor over \$800,000. The corporators organized under the lesser capital, purchased a banking house, and had accumulated a surplus of prefits. The stockholders then voted to enlarge their capital and issue the residue of the stock allowed by their charter, and constituted the directors a committee to issue and distribute the residue of such stock to the existing stockholders. The plaintiff, being a large owner of the etock first issued, and a proportionate owner of the surplus profits of the bank, which was an incident of his stock, tendered the meney to said committee, and demanded his propertionate share of the new issue of stock, and was refused. He then sued the bank, in assumpsit, for his share of the dividends on such stock, and for damages for refusal, claiming it to be a breach of contract. The court held that the plaintiff could not recover dividends, because the stock was not owned by the plaintiff; but a good title thereto was vested in the subscribers to whom the directers had distributed it. 2d. . The court held that the directors, in issuing new stock to strangers, and thereby making them shareewners in the existing surplus profits, a fixed share of which was then owned by plaintiff, was a wrong to him, for which be might recover.

When new stock is issued, which shares equally with the anisting



VI. It is insisted that this stock was transferred for the purpos of giving the preponderance of votes to the respondents. We have no doubt that such motives were strong inducements at the time, and that the respondents were determined to resort to every lawful agency to maintain their position, and repel the movement of the relator. We have no opinion of the merits of the controversy, or of the wisdom or propriety of the acts of the parties, as disclosed by the testimony. There are some matters disclosed, which, in the forum of conscience, would be obnazious to criticism, that are not unlawfal, and are not properly brought in question in this proseeding. The case shows that the stock was not merely transferred, but sold; and that the sale was actual, not colorable; and that there was no secret trust or condition; that the sale was for a necessary purpose, and beneficial to the company; that the full value was to be paid to the corporation, which has gone to its use. We think such sale is not void, but, like any other sale, can be impeached only for cause. And that the controlling inducement for the purchase, at the time, of the stock was, to enable the purchaser and his friends to out-vote the relator and his friends, does not vitiate the sale, if otherwise for honest purposes, and for full · value. We think also, that the consideration having gone to the use of the corporation, without challenge or acasonable proceedings to rescind or avoid the sale, the sale has become ratified and adopted by acquiescence. And we do not think that the reasons and principles that have guided this decision, are the novel and sinuster outgrowth of some abnormal state of things in this state, as was remotely hinted in the argument, and peculiar to Vermont, but are universal as jurisprudence, and fundamental as justice.

The rule to show cause is therefore discharged, and the petition discrined.

Supreme Court of Ohio.

GAYLORD BY AL. P. INHOFF BY AL.

The members of an insolvent firm are not entitled to the statutory exemptions out of the partnership property after it has been select in execution by partnership creditors, notwithstanding all the members join in demanding the enemptions.

ERROR to the Superior Court of Cincinnati.

The plaintiffs in error obtained judgment against the defendants Michael Imhoff, Henry Steinegerway and George Pfluger, partners doing business as M. Imhoff & Co.; execution was issued and levied upon a leasehold and machinery belonging to the defendants as co-partners. The defendants soverally demanded the statutory exemptions out of the property; but the sheriff, disregarding the demands, sold the property and brought the precede into court. The defendants then moved the court to give each of them the sum of \$500 out of the money arising from the sale of the property in lies of the property itself.

On the hearing of the metion, it was agreed between the parties as follows: "That all the property levied on and sold was partnership property, including the leasehold, and that the allidavit and demand of exemption by the defendants were filed with the sheriff before the sale, setting forth that they were heads of families, residents of the state, and not the owners of hemosteads or any other property." The motion of the defendants was allowed, and the court ordered the sheriff to pay to each of them, out of the proceeds of the sale in his hands, the sum of \$500, in all \$1500, and if the proceeds should be insufficient, then to pay to each of the partners one-third of the sum remaining in his hands after the payment of costs.

The plaintiffs excepted to the allowance of the motion and the order of the court thereon, and the ralings of the court in these respects, were assigned for error here.

James R. Challen, for plaintiffs in error.

- 1. There is no statute in Ohio which allows the judgment-debtors money: 2 Swan & Critchfield 1146, sect. 664. Under similar legislation, the Supreme Court of Pennsylvania so held in Manner v. Freeze, 19 Penn. St. 265, and so reasoned in Knabb v. Drake, 23 Penn. St. 489, and New York in Cemrick v. Myers, 14 Barb. 9. In the present case there was no selection of specific articles, no appraisement; nor could there be in the case of partnership property. The partners elected to take the same property, and it was indivisible.
 - 2. The claim is inconsistent with the partnership relation.
 - (a.) Partners are joint tenants.
- (b.) The interest of the individual partner is in the surplus only, remaining after paying partnership debts.
- (c.) No partner has an exclusive right in any joint stock, nor does his joint right descend by death; it vests in the surviver until partnership accounts are settled: Story on Part. in los.; Regere v. Merenda, 7 Ohio St. 179; Place v. Succtor, 16 Id. 142; Matlack v. Matlack, 5 Ind. 407.
 - 3. Partnership property is held in trust.
 - (a.) For the payment of partnership debts.
- (5.) For the equitable adjustment of the interests of the copartners.
- 4. Dower does not attach to partnership leads. Can surviving partners take a homestead or a year's support while both would be denied to the widow of the deceased partner and his orphea children?
- 5. The exemption may be waived: The State v. Melogue, 9 Ind. 196; Line's Appeal, 2 Grant's Cac. 198; Bosomen v. Smiley, 81 Penn. St. 226. By putting property into the joint stock of a purtnership an individual vaives the benefit of the exemption: Clogg v. Houston, 9 Legal Int. 67; Boneall v. Comby, 44 Penn. St. 447.

Matthews & Ramony, contrd, cited Stowert v. Brown, 87 N. Y. 250.

GILLEGIZ, J.—The only question that will be considered in this cause is this; Where all the members of an instituent firm join in the demand, are they entitled to the statutory exemptions out of

partnership property after it has been seized in execution by partnership creditors?

We think not. The section of the statute under which the question arises is as follows: "Sec. 8. That it shall be lawful for any resident of Ohio, being the head of a family and not the ewner of a homestead, to hold exempt from levy and sale as aformaid, personal property to be selected by such person, his agent or attorney at any time before sale, not exceeding five hundred dellars in value in addition to the amount of chattel property new by law exempted. The value of said property to be estimated and appraised by two disinterested householders of the county, to be selected by the officer," &c.: 66 Ohio Laws 50.

The decisions of the courts of other states upon this question, under kindred statutes, are calculated rather to embarrace then satisfactorily aid us in the construction of our own statute.

The confused state of the law on this subject will appear from a reference to the cases mentioned below, of which the effect only is given by way of illustration. Stewart v. Brown, 87 M. Y. 850, answers the question affirmatively; Bensell et al. v. Comby, 44 Penn. St. 442, answers it in the negative; while Burns v. Herris, 67 N. C., decides that if all the partners consent, the exemption must be allowed to each of the partners; but if such consent is not given then it must be denied to all. There is direct conflict between the New York and Pennsylvania decisions; one or the other is right and must be followed.

But we think the principles laid down by the North Carolina decision wholly untenable. The statute confers a positive right, that in a proper case can be asserted against the world, and this is a dignity that inheres in all positive legal rights. In North Carolina the right is so dwarfed that in the case of purtners its exercise becomes a more privilege depending upon the mutual consent of the partners.

It would be competent for the logislature to declare a right and prescribe the conditions upon which its exercise should depend: but when the statute creates and declares an absolute right, such right cannot be qualified, abridged or extended by judicial interpretation. If, therefore, on a fair construction of the statute, insolvent partners individually or collectively are satisfied to the statutory exemptions out of partnership property, as against partnership property, as against partnership property, let the right be granted and enforced by the court-

If not, let it be denied; and if the law is defective in this respect let the defect be cured by proper legislation.

Looking alone to the language of the section above quoted we find nothing to justify the inference that the legislature is passing it intended to provide for other than individual debtormed for the exemption of their individual property from sale of execution; and when construed in connection with the law relating to partnerships as it had always stood and still stands, we are convinced that it could not have been the intention of the lawmake to bring partners or partnership property within the operation of provisions of the section in any respect.

Dealing with the statutory right and excluding equitable cor siderations, which have no place here, our convictions are base upon the fact that the right of exemption and the mode of exercisin it prescribed by the statute, are wholly inapplicable to partnershi property or the rights of the partners therein, and inconsister with the rights of their creditors in relation thereto. The statut when applied does not affect the ownership of property in any way it neither confers, takes away nor changes the debtor's title, b partitioning into severalty that in which there was a joint owner ship or otherwise; but when properly invoked, it simply exempt the designated property from execution and leaves the ownershi as it was. The language of the section points unmistakably t property owned individually. The selection of the exempted pro . perty is to be made by the execution debtor, and the propert selected is to be appraised and set off to the debtor. "Partner are joint tenants in their stock in trade, * * * and no partne has an exclusive right to any part of the joint stock:" 8 Ken 87. Conceding that the interest of a partner in the partnership property may be seized in execution for his individual debt; sup pose a firm consisting of three or more members and such a sei sure in execution of the interest of one of them in the firm pro perty; and suppose such debtor-partner to be demanding the statutory exemption, we cannot see how he could select or th householders appraise and set off partnership property to him i the other partners objected, and even if the other partners wer concenting, it is plain that it could only be done by first assigning certain of the goods to him in severalty, which would be obtaining his exemption by contract with the other partners, and not I virtue of the statutory right. But suppose a levy of execution the firm property for a firm debt, and a demand for the statetory exemption made by one or two of the partners, and the others objecting to the exemptions being made. There would exist no right of selection by the demanding partners, and no power to set off by the officer, and hence there could be no exemption under these circumstances. The simple machinery of the statute is inapplicable and inadequate to the solution of such complications.

The right to the exemption, therefore, manifestly depends upon the power of selection, and this power must relate either to property of which the execution-debtor is the absolute owner, or to property of which he has the possession and actual control as against the officer holding the execution.

But the court below held that where all the partners domanded the exemption, they were, thereby, all consenting to the exemption, and it should, therefore, be allowed. The difficulties above suggested as to a single partner, or as to some demanding and others objecting to the exemption, arise and are equally potential here. The statute gives no countenance to the idea that there is to be a. . joint ownership in the property after it is exempted and set off; nor, as has been said, does it contemplate a partitioning into 🚁 severalty of that which is joint property, in order to get at the property that may be exempted; and in order to get at the joint property to be exempted, where all were demanding it, the consent of all the partners would have to be given to each selection made by any one of them, before it could be exempted and set off. In short, where all were demanding it, the exemptions could only be made with the mutual agreement and ecasent of all the parties, as to the selection of the joint property to be exempted. The right to make such consents and agreements, would imply either an actual ewnership of the property by the portners, or a possession coupled with an absolute power of disposition.

In this case, inasmuch as the partnership property had been seized in execution for a firm debt, before the demands for exemption were made, the legal effect of this seizure upon the property, must be considered in order to ascertain whether a right of election and exemption by consent of the partners, remained after the seizure.

The law of partnership constitutes a system by itself, which is inapplicable to any other legal relation.

In speaking "of the origin and purpose of partnership." Mr.

Parsons says: "If partnership offers advantages, it also exposes these who enter into it to peculiar liabilities. The safety of society requires this. If every partner were not held absolutely for the whole amount of the debts of the firm, by whicksoever of the partners they were contracted, a wide door would be opened for fraud and public loss. It is, however, a very common thing for persons. to try, in a vast variety of ways, to gain all the advantages and profits of partnership, without encountering these liabilities, or to escape from these liabilities when the loss has accrued. This the law forbids, and as far as it can, prevents; and, it must, therefore, be always ready to meet the contrivances, evacions and disguises resorted to by ingenious men:" Parsons on Partnership 4. One of the familiar rules in partnership is, that the partnership property and assets are primarily liable for the payment of partnership debts; and no private creditor of a partner can take by his execution, anything more than that partner's share in whatever surplus remains after the partnership effects have paid the partnership debts. The rule in equity on this point, is thus admirably stated by Mr. Justice Story; "Joint property is deemed a trust fund primarily to be applied to the discharge of partnership debts, against all persons not having a higher equity. A long series of authorities has established this equity of the joint creditors, to be worked out through the medium of the partners, that is to say, the partners have a right, inter sees, to have the partnership property first applied to the discharge of the partnership debts, and no partner has any right, except to his own share of the residue, and the joint creditors are, in case of insolvency, substituted in equity to the rights of the partners as being the ultimate ecotus que trust of the fund to the extent of the joint debts:" Story's Eq. Juris., sect. 1258. In the fact, that in connection with this possilar system, public policy and the prevention of great losses to society require each partner to be held absolutely for the whole amount of the firm debts; and equity, as to the partnership property, regards the partners as trustees holding it for the benefit of their creditors; we find a further reason for presuming that the exemption laws were not intended to apply to or affect partnership property; and we feel warranted in holding, that the levy of the execution in this case, was an absolute appropriation, in law, of the property levied on to the payment of a partnership debt, and

that these partners, being insolvent, had no remaining interest either legal or equitable in the property.

They could not, therefore, after the levy, acquire a right of exemption in the property by mutual agreement or otherwise, without the consent of the firm creditors. And while a court of equity, looking alone to the rights of all the creditors, might, in a case requiring it, have controlled the proceeds of the sale under the levy; it would not, on general principles, have had power to interfere to prevent a sale, or to deprive the plaintiffs of any legal advantages that their levy gave them. It follows that the law having seized and appropriated the property in question to its legitimate purpose—the payment of partnership debts—it was not within the power of a court of equity to take the proceeds of the property from the possession of the law, which held them for a specific purpose, and appropriate them to another.

Although as we have above found the partners were not, and could not be entitled to exemptions, either in severalty, or jointly out of the partnership property, the court below found that the partners were entitled to five hundred dollars each out of the proceeds of the property and declared accordingly.

In this there was error. We think the judgment creditors and not the partners were entitled to the money arising from the sale. Judgment reversed and cause remanded for further precedings.

Court of Common Pleas of the City of New York. JONATHAN N. HAVENS r. CHRISTIAN KLEIN.

Where a common owner of two tenements, the windows of one of which overlook the yard of the other, and receive light and air therefrom, its chatters swing out ever such yard, and access from its fire-escapes which everlang the yard being had to such yard, severs the same by conveyances to different persons, an ease-ment in favor of the tenement so overlooking the other, it being the one first conveyed, is created in respect to light and air, the swinging of the shutters, and access to and from the fire-escapes.

Such ensement is an apparent one. The grantes of the servicus tenement, the one later conveyed, is deemed to have actual notice of such exement, and takes his title subject thereto.

In such case it is immaterial whether such severages be by dead or martgage, incomesh as by ferestours the martgage is ripened into a dead.

PLAINTIFF was the owner of premises in New York city, situa-

befordent owned premises on the west side of Lexington avenue, forty-nine feet north of 50th street, twenty feet in width and eighty feet deep. A house on plaintiff's lot (a French flat), extended the whole depth of his lot. A house on defendant's lot, likewise a French flat, extended sixty feet deep; so that the northeasterly corner of plaintiff's house impinged the southwesterly corner of defendant's house.

Plaintiff's house had five stories, with three windows in each, looking out over the yard belonging to defendant. These windows such had shutters which swung out over defendant's said yard; and in the angle of the houses were built fire-escapes for each story, for the mutual use of each house, access thereto being had from the windows of the same.

These premises, in the state described, had at one time been comed by a common conter, one Buddensick, who while owner of both lots had, in 1871, built the houses in the manner stated. He thereafter mortgaged both, executing the mortgage upon the 50th street house first. It was also recorded first. This mortgage contained the usual grant of said premises with all the "rights, privileges, hereditaments and appurtenances thereunto belonging." Both mortgages were in time foreclosed; and under the decrees in foreclosure and sundry mesne conveyances the title to the 50th-street house became vested in plaintiff, that to the Lexington avenue house in defendant.

In November 1874, defendant built in his said yard, close to plaintiff's house, but upon his own land, a scaffolding forty-five feet high, upon which, opposite each of plaintiff's windows, he affixed bearding flat up against the wall of plaintiff's house, in such a manner that none of the shutters of plaintiff's rear windows could be opened; access to the fire-escapes out of the windows was prevented, and all light and air through the windows excluded, and the value of the house in that state as an inhabitable dwelling reduced to almost nothing.

Upon these facts the plaintiff brought this action to restrain the defendant from continuing such obstructions, and to have his right to light and air through such windows from defendant's land, and to swing his shutters on defendant's land, and to have access undisturbed to said fire-escapes declared and enforced, and for a perpetual injunction.

According to the practice of the state of New York, an order to show cause why an injunction should not be granted pending the action was obtained, with a temporary injunction meantime, and on the return of such order defendant appeared to show cause and moved to vacate the temporary injunction, plaintiff moving to make it permanent.

Nelson Smith and John Brooke Leavitt, of counsel for plaintiff, cited: Lampman v. Mills, 21 N. Y. 506; Veerheee v. Burchard, 55 N. Y. 98; Butterworth v. Crauford, 3 Daly 57, s. c. 46 N. Y. 349; Webster v. Stevens, 5 Duer 558; Ene v. Del Vecchie, 6 Duer 17; Hendricks v. Stark, 87 N. Y. 106; Compton v. Richards, 1 Price 27; Pyer v. Carter, 1 Hurlot. & N. 916; Rivieri v. Bower, 1 Russell & Milnes 24; 3d Blackst. 218; F. N. B. 183; 2 Rolle's Abr. 140; Wash. on Easm. 492, 575-7; 2 Story Eq. § 925-6; 1 Fonbl. Eq. 8 note; 2 Wash. Real Prop. 316-19; Myere v. Gemmel, 10 Barb. 548; Story v. Odin, 12 Mass. 157.

Julius J. Frank, of counsel for defendant, cited: Mahan v. Brown, 18 Wend. 261; 2 Wush. Real Prop. 816-819; Pickard v. Collins, 28 Barb. 444; Bury v. Pope, Cro. Elis. 118; Palmer v. Wetmore, 2 Sanf. 816; Parker v. Foots, 19 Wend. 809; Myers v. Gemmel, 10 Barb. 587; Hoffman v. Armstrong, 46 Barb. 887; Relyea v. Beaver, 84 Barb. 547; Poople v. Central Railroad Co., 42 N. Y. 288; Collier v. Pierce, 7 Gray 18; Pheyory v. Vioary, 16 M. & W. 484; Johnson v. Jordan, 2 Met. 284; Certrey v. Willis, 7 Allen 864; Randall v. McLaughlin, 10 Allen 866; Brakely v. Sharp, 1 Stockton Ch. 9; 5. C. Id. 206.

DALY, C. J.—Much of the law discussed upon this motion has in my judgment no bearing upon the question which arises in the case. It is settled in this state that no right to the use of light and air in a building everlooking the land of another is acquired by use, enjoyment or pre-emption. It can pass only by express grant or covenants, and will not pass by implication of a grant (2 Washburn on Real Property \$19, 3d ed. \$39), unless it is necessary to the enjoyment and was clearly intended from the circumstances existing at the time when the conveyance was made: Voerhees v. Burchard, 55 New York 98; Cometock v. Johnson, 46 Id. 6, 15; Muttermeyer v. Albro, 18 Id. 48; Micheles v. Chamberlade, Ore.

Jac. 121; New Ippwich Factory v. Batchelder, 8 N. H. 190; United States v. Appleton, 1 Sumner 492.

The two lots in this case originally belonged to the one owner; the lot on the westerly side of Lexington avenue extending back 80 feet, so as to meet the rear of the lot, on the northerly side of Fiftieth street, along which lot the rear of the Lexington street lot extended for 20 feet. On the Fiftieth street let the then owner erected a building covering the whole of that let as it now exists, in the rear of which lot he placed windows for light and air over-looking the rear of the Lexington street lot, and on the Lexington street lot he erected a building 60 feet deep for which the rear of the lot for the remaining 20 feet served as a yard, which yard was everlooked by the windows of the building on the Fiftieth street lot and in the yard he erected a fire-escape for the joint use of the two buildings.

The two lots were severed by the foreclosure of mortgages given by the owner and the sale of the lots, as separate lots; under which sales the plaintiff has become the owner of the Fistieth street lot and the defendant of the Lexington avenue lot. The defendant claiming the right to the exclusive use of the yard, has erected a wooden sence, by which he has cut the plaintiff off from the use and enjoyment of the windows in the rear of the building on the Fistieth street lot, and also from the use of the fire-escape.

The question in the case is, whether the plaintiff at the severance of the two lots had a right to the light and air from the windows in the rear of his building and to the use of the fire-escape, of which the defendant could not deprive him, and it appears to me that the case comes clearly within the rule illustrated by SELDEN, J., in Lampman v. Mills, 21 N. Y. 511. "If," says Judge SELDEN, "both proprietors obtained their title from a common source, the same granter having conveyed the tenement with the windows to one and the ground overlooked to another, the windows cannot be obstructed, and the reason is, that the relative qualities of the two tenements must be considered as fixed at the time of their severance; each retains, as between it and the other, the preparties then visibly attached to it, and neither party has the right afterwards to change them;" for which he relies on Con v. Matchese, Ventrie 237, a case which fully bears out what he states.

The rule of the common law is, says Judge SELDEN, that where the owner of two tenements selle one of them, the purchaser taken the tenement sold with all the benefits and burdens which appear at the time of the sale to belong to it as between it and the preperty which the vendor retains; which he adds is one of the recognised modes by which an easement or servitude is created. If the burden he remarks is open and visible, the purchaser takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has the right by altering arrangements then openly existing to change materially the relative value of the respective parts.

In the subsequent case of Butterworth v. Crauford, 46 N. Y. 349, the judgment of this court was reversed solely upon the ground that the servitude was not open and visible.

The rule above stated was not questioned; but the decision was put upon the ground that there must be some mark or sign, which would indicate the existence of the servitude to one reasonably familiar with the subject, upon an inspection of the premises, for in the present case the right which was claimed was open and visible, as it was the windows in the rear of the house on the Fiftieth street lot and the fire-escape which had been built for the joint use of both houses.

In Robbins v. Barnes, Hob. 181, the two adjoining houses were so built that one overhang a portion of the other, and although this overhanging was originally wrongful, yet as both houses afterwards became the property of one person and through him were divided, it was held that they were taken as they were at the time of the conveyance by which they were severed and that the owner of the house which overhang was entitled upon taking it down to rebuild the new house so as to everhang in the same manner, and it has been recognised in several enece, that if one ewning a house with windows looking out upon adjoining land of his own, self each house, he cannot afterwards build upon the adjoining land, so as to stop or obstruct the light of each windows: Story v. Odin, 12 Mass. 157; Great v. Chase, 17 Id. 448; Cherry v. Klein, 11 Md. 24; 2 Washburn on Real Property 818; 3d ed. pl. 86 and note.

It can make no difference in the application of this rule whether the severance took place by a direct grant from the owner, or areas by the transfer of his interest upon fereslesure sale, for the reason of the rule applies as much in the one case as in the other. The question is what each party got on the severance. Did the purchaser of the Lexington avenue lot, who bought as would appear from the pleadings after the plaintiff purchased, take that lot subject to the plaintiff's right to the joint use of the fire-escape and to the use of the windows in the rear of the building for light and air?

In my judgment he did, and I shall therefore deny the motion to dissolve the injunction.

Supreme Court of Missouri.

ELIZABETII A. MATTHEWS D. THOMAS SKINKER ET AL.

A national bank has no power to take a mortgage as security for the loan of money (except in certain specified cases to secure previously existing debts), and if it does so, the mortgage is void and preceedings upon it will be enjoined.

Corporations having only the powers expressly given by their charters or the law under which they are incorporated, or such as are necessarily implied, must follow strictly the mode of action prescribed by the law.

The National Bank Act not only fails to authorize, but expressly prohibits the banks from dealing in real estate scenricies, except in certain specified cases to secure debts previously due.

Ennon to the St. Louis Circuit Court. The facts appear in the epinion, which was delivered by

WAGNER, C. J.—The error complained of in this case is the action of the court in rendering a perpetual injunction restraining the trustees from selling the plaintiff's property. From the record it appears that the plaintiff executed her note payable to Sterling Price & Co. for \$15,000, due two years after date, and to secure the payment of the note she made a deed of trust, bearing even date with the same, on certain real estate belonging to her. note and deed of trust were delivered to Sterling Price & Co., who afterwards transferred them to the Union National Bank of St. Louis, a banking institution organised under the Act of Congress, to secure a loan for \$15,000, advanced to Price & Co. by the bank. Price & Co. failing to pay the money advanced on the note and secured by the deed of trust, the trustees at the request of the bank advertised the property for sale, and the plaintiff filed her petition to enjoin the trustees and the bank from proceeding with the sale. Whether the deed of trust in the hands of the bank amounted to a valid security, which could be enforced in payment of the money

advanced, depends upon the construction of the Act of Congress providing for the formation of national banking associations (Rev. St. U. S., p. 998). By section 5, 136 of the Revised Statutes, authority is given to the banking associations "to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and ballion; by loaning money on personal security," &c. By section 5, 137, it is provided that: "A national banking association may purchase, hold and convey real estate for the following purposes, and for no other: First, such as shall be necessary for its immediate accommodation in the transaction of its business. Second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth, such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it."

The act, as will be thus seen, gives the association power to hear money on personal security, and to purchase, hold and convey real estate in certain specified cases. The general principles defining the extent and mode of exercise of corporate powers are well settled and have often been passed upon by this court. Corporations have only such powers as are specially given by their charters, or are necessary to carry into effect some specified power: St. Louis v. Russell, 9 Mo. 507; Blair v. Perpetual Inc. Co., 10 Id. 509; Ruggles v. Collier, 48 Id. 858. They must act strictly within the scope of the powers conferred on them by the act calling them into being; and where a grant of power from the legislature is relied on, the mode prescribed in that grant for doing any particular thing must be pursued according to the law creating them: Hen. A St. J. Raibroad Co. v. Marion County, 86 Mo. 294. Tho distinction between natural persons and corporations is, that while the former may make any contract not prohibited by law or against public policy, the latter can exercise no powers not expressly conferred on them by their charters: Bank of Louisville v. Young, 87 Mo. 898. In Great Eastern Railway v. Turner, L. R. 8 Ch. Ann. 152. Lord Chanceller SELECREE gave a brief and combeneive statement of the law applicable to questions of corporate powers. He said, "The company is a more abstraction of law. All that it does, all that the law imputes to it as its act, must be that which can be legally done, within the powers vested in it by law. Consequently an act which is ultra vires, and unauthorized, is not an act of the company, in such a sense, as that the consent of the company to that act can be pleaded."

As this case depends upon the interpretation of a national statute we may refer to some of the cases in United States Supreme Court, to see what view that tribunal has taken of the law concerning the powers of corporations.

In the Bank of the United States v. Danbridge, 12 Wheat. 64, the rule is stated to be, that, "whatever may be the implied powers of aggregate corporations by the common law, and the modes by which these powers are to be carried into operation, corporations created by statute must depend, both for their powers and the mode of exercising them, upon the construction of the statute itself."

In Head v. Providence Insurance Co., 2 Cranch 127, Chief Justice Marshall defined the powers and limitations of statutory corporations with great clearness, as follows: "Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it ewes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may be correctly said to be precisely what the incorporating act has made it: to derive all its powers from that act and to be capable of exerting its faculties only in the manner the act authorises."

Judge STRONG, now of the Supreme Court of the United States, in delivering the opinion of the Pennsylvania Supreme Court, in a case where the National Banking Law was directly brought in question, said: "The bank is a creature of the act, dependent on it for all its powers, and controlled by all the restrictions which the act imposes:" Venange Nat. Bank v. Taylor, 56 Ponn. St. 15.

In all the cases where questions have been raised respecting the powers and liabilities of national banks, it has been invariably held that the banks have only the powers conferred upon them in the act providing for their formation; that from that act they derive their sole authority; and that they must be strictly governed by it and kept within the line of its limitations. In Wiley v. The

First National Bank of Brattlebors, 14 Am. Law Reg. N. S. 842, it was decided that the taking of special deposits, to keep merely for the accommodation of the depositor, was not within the authorized business of banks organized under the Act of Congress, and that the cashiers of such banks had no power to bind them on any express contract accompanying, or on any implied contract arising out of such thing. So, in a recent case in Maryland (Weckler v. The First Nat. Bank of Hagerstown, 14 Am. Law Rog. N. S. 609), it was held that in the act authorizing the incorporation of national banking associations, the kind of banking was limited and defined, and as the act contained no grant of power to engage in bond-brokerage, it was, therefore, prohibited to the banks, and that it was not necessary to the purpose of their existence, or in any sense incidental to the business of banking. It was, accordingly, decided that in an action of deceit against a national bank, seeking to recover damages for the alleged fraudulent representations of its teller made in the sale to the plaintiff of certain railroad bonds, that the business of selling bonds on commission was not within the scope of the powers of national banking associations, and that the bank could not under any circumstances carry it on, and being thus beyond its corporate powers, the defence of ultra vires was open to it, and that it was not responsible for any false representations made by its teller by which the plaintiff might have been damaged.

The very question which comes up for adjudication in this case was presented and passed upon in Fowler v. Soully, 72 Penn. St. 456. In that case Fowler, without any previous indebtedness, gave to the First National Bank of Pitteburgh a mortgage to secure the bank for notes, &c., thereafter to be discounted for him. Upon proceeding for fereclosure the court decided that lending money by a national bank on mortgage or real estate security was wires and forbidden, and the mortgage was declared to be void.

Mational banks possess just such powers as the act incorporating them gives to them—no more. They are the creatures of the act, and controlled by all its restrictions and limitations. Express power is given to them to "carry on the business of heaking by discounting and negotiating promisecry notes, drafts, bills of exchange and other evidences of debt; by buying and selling enchange, coin and builion; by loaning money on personal accurity;

sions of the act." Banks are formed and organized for commercial purposes, and not to deal in real estate. Their business is to discount and negotiate promissory notes, drafts, bills of exchange and other evidences of debt, the buying and selling of bills, bullion and lending of money on personal security. To permit them to lean their money on real estate security would be destructive of their efficiency and defeat the object had in view in their creation. Instead of being agents for purposes of trade, dealing in commercial paper, discounting notes and furnishing the necessary facilities for loans, they would have their capital locked up in landed property, and thus be powerless to carry on the business which induced their organization. These speculations in real estate are also basardous and have no legitimate connection with the business of banking; they require the employment of outside parties to look after the land and examine titles and are apt to embark the banks in enterprises which sooner or latter will end in insolvency. Congress doubtless had these considerations in view, when it provided that the money should be loaned on personal security. When the mode of personal security was declared and pointed out, that excluded all others, for the maxim expressio unius est exclusio alterius, must provail in this case.

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But the intention does not rest merely on the provision requiring personal security on loans. Section 5187 specifies for what purposes national banking associations may hold and convey real estate. and forbids their dealing in that kind of property for any other purpose. They may purchase and hold so much real estate as may be necessary for their immediate accommodation in the transaction of their business; such as may be mortgaged to them in good faith by way of security for debts previously contracted; such as shall be conveyed to them in satisfaction of debts previously contracted in the course of their dealings, and such as they shall purchase at sales under judgments, decrees or mortgages held by them, or shall purchase to secure debts already due. These are the specified instances, and the only instances, in which it is permissible for national banking associations to purchase or hold real property. Aside from the real estate necessary for the transaction of their business they can only acquire that description of property, to eaable them to secure themselves for debts previously contracted. But in no case can they loan money on the faith of real estate security, where the debtor was not previously indebted to them.

If they do, the security taken is ultre sires and void, and may be pleaded by the party as a defence against its enforcement.

The case at bar shows that there were no previous dealings between the plaintiff and the bank; the bank leaned the money and took the deed of trust as security. This it had no power to do, and the judgment of the court below will be affirmed.

Supreme Court of Rhode Island.

REBECCA PERKINS v. REBECCA PERKINS, Apprintmatrix.

An executor or administrator caunot bring suit against himself for a dobt due him by his decedent.

Ox demurrer to plea in abatement.

Dexter B. Potter, for Rebecca Perkins.

Tillinghast & Ely, for administrator de bonie non, intervening.

The opinion of the court was delivered by

DURYER, C. J.—This is an action of assumpsit to recover for services performed, and for care, provisions, and clothing farnished by the plaintiff to Jacob Perkins and his wife, during the lifetime of said Jacob. The plaintiff was administratrix on the estate of said Jacob, and commenced the action by service of the writ upon herself as such. She declared against herself as administratrix. The first plea is a plea in abatement. It was filed by Nathan M. Lockwood, and sets forth that he has been appointed administrator on the estate of said Jacob, in place of the plaintiff, who has resigned. It prays that the writ may abate, because the plaintiff and the defendant named in the writ are the same person. The plaintiff demurs. Nathan M. Lockwood joins in the demurrer.

The plaintiff does not cite any case to show that the action can be maintained. It is not the ordinary common law remedy. The ordinary common law remedy is retainer. Blackstone says: "If a person indebted to another makes his creditor his executor, or if such creditor obtains letters of administration to his debter; in these cases the law gives him a remedy for his debt by allowing him to retain so much as will pay himself, before any other creditors whose debts are of equal degree. This is a remedy by the more act of law, and is grounded on this reason: that the executor cannot, without an apparent absurdity, commonse a suit against himself, as a representative of the deceased, to recover that which is due to him in his own relacts cannot and the recover that which is due to him in his own relacts cannot and the recover that which

personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor, he would be in a worse condition than all the rest of the world besides:" 8 Bl. Com. 18.

The plaintiff, by way of justification, says the estate was represented insolvent, commissioners were appointed, and her claim was submitted to them and by them rejected. The statute provides that any creditor, whose claim is wholly or in part rejected, may have the same determined at common law, in case he shall give notice thereof in writing in the office of the clerk of probate within forty days, and bring and prosecute his action within sixty days, after the report of the commissioners shall have been received. The plaintiff says she commenced the action against herself, because, if she had waited for the appointment of an administrator after the report was received, she would have lost her right of action under the statute by the delay. In this view, the case is a hard one. But it was not necessary for the plaintiff to dolay resigning until the report was received. She might have resigned as seen as she knew the estate was insolvent, and she would have to submit her claim to the adjudication of commissioners. It is well for an administrator to resign when he finds the estate is insolvent, if he has a claim against it which is open to question; for, etherwise, he may be tempted to take advantage of his position, and favor himself at the expense of other creditors. We think the action cannot be maintained. The demurrer will therefore be everraled, and the plea in abatement sustained.

. ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹
SUPREME COURT OF NEW HAMPSHIRE.²
SUPREME COURT OF ORIO.⁴

ADMIRALTY.

Collision—Steamer and Sailing-ressel.—A steamer held to be exclusively responsible for a collision with a sailing-vessel; the collision having successed on a night when the stars were plainly visible, and when,

¹ From John Wm. Wallace, Roy., Reporter; to appear in vol. 20 of his Reports.

^{*} From Mon. M. L. Freeman, Reporter; to oppose in 77 Illinois Reports.

^{*} From J. M. Shirley, Esq., Reporter ; to appear in 80 New Hampshire Reports.

⁴ From R. L. De Witt, Bog., Beguiter; to oppose in \$4 Ohio St. Reports.

though a little hase was on the water, the night was to be called elenr; there having apparently been some want of vigilance in the lookout of the steamer, who did not discern the sailing-vessel until the steamer was close upon her, at which time orders, which, as the result proved, tended to bring on a collision, were given on board the steamer: The See Gull, 28 Wall.

(billision — Two Steamers—Mutual Fisult.— Two steam-vessels, one an iron steamship (an ocean vessel of twenty-five hundred tens), coming from sea up the Mississippi to New Orleans, and the other a small river steamer of one hundred and thirty-five tons, trading up and down the river below New Orleans from plantation to plantation, and carrying passengers, and getting market produce for the city just named, held, in a case of collision, to be equally in fault for running at full speed in a very dark and foggy night, after they had learned by signals from each other of their respective existences in the river, and while they were in doubt as to what respectively were their occase and memoryres: The Tentonia, 28 Wall.

Collision—Sailing-ressels meeting.—The rule of navigation prescribed by the Act of Congress of April 29th 1864, "for preventing collisions on the water," which requires "when sailing-chips are meeting and on, or nearly so, the helms of both shall be put to port," is obligatory from the time that necessity for precaution begins, and continues to be applicable so long as the means and opportunity to avoid the danger remain:

The Dester, 23 Wall.

In a collision at sea, happening on a bright metalight night, and when the approaching vessel was seen by the effect in charge of the dock long before the collision occurred, the absence of a lookout hold unimportant; it being assumed that his presence would have done nothing to avert the estastrophe: Id.

ACENT.

Action by undisclosed Principal upon Contract of Agent—Entirely of Contract.—A, acting as the agent of B. and C., who were tenants in common of certain real estate, leased the same to the defendant by a contract not under seel, unde in his own name, and did not disclose his agency or the state of the title to the premises demined: Held, that an action to recover the rent might be maintained in the name of B. and C.; held, also, that the contract was entire, and that the principals must join in the action: Bryant v. Wells, 56 N. H.

ABBITRATION. See Estoppel.

ATTORNEY.

Rights of Complement—Duty of State's Attorney—Practice.—A complement, who sies a likel to procure the forfsiture of personal property for violation of law, and proceedes the same wholly at his own expense, is entitled to do so without interference from the state's attorney: State v. Tofts, 56 N. H.

When such libel is presented at the expense of the enusty, its direction will be taken charge of by the atterney-general or solicitor:

A prosecuting officer will use his discretion, according to the circumstances of each particular case, whether to enter a nolle procequi, or presecute to final judgment: Id.

BANKER.

Money Deposit.—In case of a general deposit of money with a banker, a previous demand by the depositor, or some other person by his order, is indispensable to the maintenance of an action for such deposit, unless circumstances are shown which amount to a legal excuse: Brakm v. Adkins, 77 IN.

BANKRUPTOY. See Vendor.

Discharge of Liens—Mortgage cannot be discharged by Sale without Notice to Mortgagee.—Although district courts of the United States, sitting in bankruptcy, have power to order a sale of the real estate of the bankrupt which he has mortgaged, in such a way as to discharge it of all liens, and although as a general thing, if they order a rale so that the purchaser shall take a title so discharged the purchaser will have a title wholly unencumbered, yet to pass in this way an unencumbered title of property previously mortgaged, it is indispensable that the mortgages have notice of the purpose of the court to make such an order; or that in some other way he have had the power to be heard, in order that he may show why the sale should not have the effect of discharging his Hen. And if a rale he made without any notice to him, his mortgage is not discharged: Ray v. Norsecorthy, 23 Wall.

Supervisory Jurisdiction of Circuit Court.—A proceeding under the Bankrupt Act, in which by petition in form, the assignee sets forth articulately that A., B., C., &c., claim liens against the bankrupt's estate, the validity of each of which liens he, the assignee, denies, and in which he preys that the parties setting up the liens may be made parties, and be required to answer, each of them, all his charges and allegations as made, and be compelled, each of them; to set forth and state in their respective answers the particulars and facts upon which their respective claims are based, and that on final hearing all questions and rights of each and all the parties may be accertained and determined by the court, and that the petitioner be directed to sell the estate and distribute the proceeds; and in which the assignee prays that he "may here such other and further relief in the premises, and may be further directed in his duties as the nature of the case requires;" in which preecoding, the parties asserting the liens answer in form and the assignee replies in form, is a "case in equity" within the eighth section of the Bankrupt Act, which gives an appeal to the Circuit Court in all cases in equity; and is not a case for the general superintendence and jurisdiction by that court given in the accoud section of the act, in cases where no previous for the supervision of the Circuit Court is otherwise de: *Stickney, Assignes*, v. Wilt, 23 Wall.

The fact that a subposes is not prayed for, does not change this view;

the defendants voluntarily appearing: M.
If such a case be taken into the Circuit Court under this general superintending jurisdiction given by the said second section, it is wrongly taken. No jurisdiction exists there so to review the case. And no appeal lies to this court from the action of the Circuit Court made under sh akronmetences : Id.

Where a case has been so taken, and the decision reversing the decree of the District Court is in favor of the party taking it, this court will reverse the judgment or decree of the court below, and remand the sait with directions to dismiss it: Id.

But in the present case, where, owing to the lapse of time, the party who had the decision of the Circuit Court (reversing that of the District Court) sgainst him, would be prevented from having, as matter of right, a review of the case by the Circuit Court on an appeal properly taken under the eighth section, this court thought it fitting to suggest that perhaps, on a proper application, the District Court would grant a review of the decree that it had rendered, which review, if granted, would by the foundation, in case of an adverse decision, as before upon the merits, for an appeal in proper form to the Circuit Court: Id.

Jurisdiction of Circuit Court.—A petition addressed to the District Court "in bankruptcy sitting," by a person who has been decreed an involuntary bankrupt, " for a review of the record of the said proceedings in bankruptcy, and that the decree declaring the petitioner a bankrupt be set saids and vacated, and the petition of the petitioning creditor be dismissed and the petitioner's estate be restored to him; and for such other and further relief in the premises as may be equitable and just"-the erders and notices and every proceeding in the matter being entitled as in the original proceeding "in bankruptcy"-is but a petition filed in the eriginal proceedings in bankruptcy; and is not a bill in equity to imposeh the adjudication for fraud. It cannot be separated from the original proceedings and taken into the Circuit Court by appeal as a case in equity under the eighth section of the Benkrupt Act. If any action by the Circuit Court is wanted by the person decreed a bankrupt, he much obtain it under the second section of the Bankrupt Act, which gives a general supervisory jurisdiction to that court over the proceedings of the District Court, except where special provision is otherwise made. No special provision is made in such case for review by the Circuit Court. From any decision by the Circuit Court, acting in its general supervisory jurisdiction conferred by the second section, no appeal or writ of serve lies to this court: Sendusky v. National Bank, 28 Wall.

BILLS AND NOTES.

Ownership of.—Where the payee takes up a promissory note after its negotiation by him, the ownership, both legal and equitable, will return to him, and he may maintain an action thereon in his own name. He may in such case strike out the endorsements, or, if in blank, fill them up to himself: Palmer v. Gardiner, 77 111.

Fraud—Innocent holders.—A. made his promisery note, expressed to be for value received, whereby he promised to pay B., or bearer, forty dellars profits with interest, one year from date. As to A., the note was entirely without consideration, and was obtained from him by fraud. The plaintiff subsequently because the innocent leaf fide purchaser thereof before maturity: Held, that the instrument in the hands of the plaintiff was a valid, negotiable promisery note, and might be recovered; that the word "profits," as to the plaintiff, did not express or suggest a contingency or uncertainty, but an absolute existing final

is only prind floor evidence of the truth of the matter therein recited, and consequently may be put in issue, before judgment, by plea in abstement: Albert v. Thorp, 77 III.

STATUTE. See Language.

Interpretation by legislative Journals—Internal Resense—Ins on Corporations,—Under the Internal Revenue Act of July 1879, which exacts that "there shall be jevied and collected for and during the pair 1871, a tax of 21 per cent. on the amount of all interest paid by corporations, and on the amount of dividends of esrnings hereafter declared by them," and which directs that such interest and dividends shall not, after the 1st of August 1879, be taxed under prior acts; interest paid and dividends declared during the last five months of the year 1879, are taxable, as well as these declared during the year 1871, it appearing that income of other sorts was meant to be so taxed, and there being no apparent reason why income derived through corporations should not be taxed like income generally: Bloke v. Netland Banks, 28 Wall.

A badly-expressed and apparently contradictory exactment (such as the eas above mentioned), interpreted by a reference to the Journals of Congress, where it appeared that the possibler phrasoclagy was the result of an amountment introduced without due reference to language in the

eriginal bill: Id.

STREAM.

Boundary—Middle Thread.—Where, in a deed of conveyance, the middle of a known stream is called for as the boundary line between adjacent proprietors, the thread of such stream, notwithstending it may have been changed in its location by attrition and accretion, will control the courses and distances named in the conveyance, and will continue to be the boundary line between the lands of the respective proprietors: Michaus v. Shephard, 26 Ohio St.

SUBSTY.

Areast Co-survives.—The plaintiffs and the defendants, all but F., were stockholders in the White Mountaine Hailroad Corporation. The corporation was indebted to the extent of about \$100,000, was inscirent, and the stockholders supposed themselves to be individually liable for its debta. The parties to this suit, and others, being desirous of relieving themselves from their liabilities, formed a plan, the object of which has to presume a discharge of these liabilities on the best terms practicable. In pursuance of this plan they executed bonds, and placed them in the hands of F., the condition of which was substantially as follows:

"The condition of this obligation is and it is payable upon the perfermance of the following conditions and it is payable upon the perfermance of the following conditions and it is payable upon the perfermance of the following conditions and it is purpose of purchasing the claims against the White Mountains Railroad, which has not been effected, and then the creditors of the White Mountains Railroad are to deposit with the said Forr legal and proper discharges or assignments of all their several claims against said corporation and its survites, to be held by each Forr, in trust for and subject to the order of said creditors, until such an assessment as may be necessary to pay the several sums that each creditors may agree to accept for their several claims against said

corporation and its cureties has been secured or piedgod, to the esticination of said trustee, and then to hold said claims so assigned as aftersaid, for the use and benefit of all those who contribute towards the
purchase of the same, for the purpose of compelling those stockholders
in said corporation, who do not contribute anything towards making up
the sam necessary to purchase said claims, to pay their proportion
thereof p—now, whosever the said Farr shall be estimed that all the
claims against said corporation, or as near that as the nature of the case
will admit, have been discharged or assigned as aforesaid, and held by
him for the purposes aforesaid, and shall have notified us in writing of
the same, which notices may be sent to us by mail if not given personally,
then we are to pay to said Farr, or to his order, the penal sum named
in the foregoing bond, within the time stipulated therein, with interest
from the time of such notice—then this obligation shall be void:" Fineleir v. Revington, S6 X. II.

The defendant stockholders, having purchased in the entstanding Slabilities of the corporation for about \$10,000, succeeded in collecting about \$50,000 from the enrogation, and enough to indomnify them against all their outlays and expenses in the transaction. F., having given the notice mentioned in the foregoing condition, preceded to put the bends in suit for the benefit of the defendant stockholders: field, that the relation of co-curation existed between the plaintiffs and the defendant stockholders; that the debte, as against the plaintiffs, were discharged, and that the defendant stockholders had no claim against them but for Indomnity, which they had already received; that the bonds were not enfloctible; that the trustee was smoother officie, and about he enfolged from collecting the bonds: Mr.

TAXATION. See Notional Dunk.

United States Surrant Court. See Constitutional Law.

Usuny. See National Bunk.

Mortgage—Interest on Interest.—Where one purchases land subject to a mortgage lion, and, as part of the ennoideration, agrees to pay the mortgage dobt, he cannot defend against the mortgage on the ground of many: Groupe v. Lenger et al., 26 Objects.

of usury: Cramer v. Lepper et al., 26 Obio 8t.
Under a contract for the payment of interest at a specified rate annually, upon default of payment, interest on the interest will be computed at six per cont.: Id.

VENDOR AND PURCHASUR.

Funder's Lien—Bankruptay—Statute of Lieutethers.—Where a party agrees to sell land to enother, and, so consideration therefor, the render gives his premiseary notes, payable at a future date named, and the render gives his bond conditioned that on the payment of the notes he will convey the premises in the to the render, but makes so deed, the legal enters remains, until the payment of the purchase-money, in the render, and he has, by the law of those states where such lieus are recognized, a "render's lieu." The render has an equitable title only; one indeed which he can sell or devise, but one which, if the purchase-money is unpaid, he cannot sell so as to exclude the render's right to have payment of it. Any purchases from the render who assumes to

pay the notes takes the same title that the vendee had; that is to say, an equitable title, the land being still charged with the payment of the

purchase-money: Lewis v. Hawkins et al , 23 Wall.

A discharge of such purchaser from the vendee under the Bankrupt Act will relieve such purchaser from paying the notes, but it will not give him a legal title in fee to the lands. That title, subject to the equity of the vendee, or of the purchaser from him, remains in the vender: Id.

A statute of limitations barring suits for the recovery of real estate after a certain lapse of time, does not apply to a case like that above described. The vender, or the purchaser from him, stands in the relation of a trustee to the vender for the unpaid purchase-money (or, as the matter is looked upon in some states, stands in that of a mortgages), against whom the statute does not run: Id.

If the notes are not paid, the vendor may apply by bill in equity against the vendee and the purchaser from him, tendering a good deed, and ask that they pay the purchase-money at short date or be foreelesed from setting up any right to the land, and that it be sold and the pro-

coeds applied to paying the purchase-money: Id.

Where confessedly the title of a party claiming land as owner, and who has agreed to sell, is denied by the vendee and a dispute has taken place about title, so that a tender of a deed would be a useless ceremony, costs on a bill filed to enforce the payment of the purchase-money must abide the result of the sait: Id.

If the purchaser from the vendee be dead, leaving a widow, his executrix, and heirs-at-law to whom with her his real estate has descended, they ought to be made parties defendant to any bill to foreclose: Id.

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AMERICAN LAW REGISTER.

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DRUNKENNESS AS AN EXTENUATION IN CASES OF MURDER.

THE relation of drunkenness to moral agency is one of these vexed questions with regard to which the opinions of moralists have ever been at variance, and upon which their conclusions are to-day not more harmonious than they were when the matter may have first attracted their attention. Jurists, too, have differed very widely among themselves as to the degree of guilt which may attack to deeds perpetrated by agents who had voluntarily yielded to an appetite whose indulgence they well knew would destroy their reasoning powers and rob them of all prudence and self-So great disagreement have the laws of different times and of different nations shown upon this question that we may find intoxication variously regarded as leading to acts done under its influence-almost every shade of guilt, from that slight degree of moral laxity of which the laws of most countries take no notice, to the baseness and turpitude which would render it an aggravation of the offence. Accordingly as the spirit of the age upon which their lot was cast inclined toward the doctrine that " mercy and reformation," rather than "severity and annihilation," should be the rule of society in dealing with its criminals, mankind have been disposed to look upon drunkenness as an excuse, a matter of indifference or an aggravation of guilt. In England, for instance, in the days of Lord Conz (4 Bl. Com. 25), when all the bigher species of crimes were punished with death in one form or other, intexication was held an aggravation of whatever offence a criminal might commit, and the justice might take account of it as ground for increasing the severity of the punishment; though no additional penalty was inflicted for the drunkenness itself, as was the case with a law of Pittacus, dictator of Mitylene, which provided that he who committed a crime when drunk should be doubly punished, first for the crime itself, and again for having brought himself into a state of shriety. Through a period of many years later, in the criminal jurisprudence of England, no account whatever was made of the fact that a person at the time of committing an unlawful act was deprived of the use of his reason and prudence by strong drink. It could neither modify the nature of the offence nor affect the penalty which should follow it.

Within the last half century, however, the harshness of the English law, in this respect, has been considerably mitigated, and the question of drunkenness in cases of homicide has been taken into consideration, hot only in determining whether or not there were sufficient provocation to reduce the crime to manslaughter, but also in the inquiry as to intent and malice, where no provocation whatever existed. Thus judges have charged that "drunkenness may be taken into consideration, in cases where what the law deems sufficient provocation has been given; because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that nassion is more easily excited in a person when in a state of intexication than when sober:" Rez v. Thomas, 7 Car. & P. 817. in a later case the justice said that "such a state of drunkenness may no doubt exist as would take away the power of forming any specific intention:" Regins v. Monkhouse, 4 Cox C. C. 55; and this would seem to indicate that the degree of guilt must necessafily be less in a case of homicide happening under such circumstances, than where it was wilful, deliberate and with intent to destroy life.

The doctrine of this latter decision is that upon which are founded the rulings under our various state statutes which divide murder into two degrees, according as the killing is wilful, deliberate, premeditated and malicious, or as it is unattended by some of these attributes. In many of the states where such distinction has been made by statutory executeent, it has been held that market

done by a man in a state of intoxication so great as to render him incapable of forming a design, shall be murder in the second degree; provided, of course, a premeditated design of murder did not exist in the mind of the criminal previous to his becoming intoxicated. For "if a man designing a homicide drinks to intoxication, and commits the crime in that condition, he is guilty of murder the same as if he were sober:" Smith v. Commonwealth, 1 Duv. (Ky.) Thus it was said in the late Pennsylvania case of Commonwealth v. Fletcher, 88 Leg. Intelligencer 18, following a number of similar decisions in the same state (Keenan v. Commonwealth, 8 Wright 55; Commonwealth v. Hart, 2 Brewster 546; Kelly v. Commonwealth, 1 Grant's Cases 484; Commonwealth v. Crosier, 1 Browster 849; Commonwealth v. Miller, 17 Leg. Int. 276; Warren v. Commonweakh, 1 Wright 45): "If a man's intoxication le so great as to render him unable to form a wilful, deliberate and premeditated design to kill, or of judging of his acts and their legitimate consequences, then it reduces what would otherwise be marder of the first degree to murder of the second degree." like rulings are to be found in other states: People v. Harris, 29 Cal. 678; Pirtle v. State, 9 Humph. (Tenn.) 664; Commonwoolth v. Jones, 1 Leigh (Va.) 612; People v. Hammill, 2 Parker C. R. (N. Y.) 228; State v. Harlow, 21 Mice. 446; State v. Bullock, 18 Ala. 418; State v. Johnson, 40 Conn. 186.

These statutes and the rulings under them do not change in the least the nature of the crime known as murder, but only provide that one species of it shall be called murder in the first degree and shall be visited with a punishment more severe than that assigned to a less malignant form of killing, to which the name murder in the second degree is given. So that, whatever was murder at the common law, with all its forms of implied malice, its doctrine of momentary deliberation and its disregard of voluntarily produced madness, is murder to-day. In Weigherst v. State, 7 Md. 442, is was said: " the statute does not create a new offence, but morely establishes a rule to guide the courts in awarding punishment." Such interpretation has abundant authority: Minn. v. Lessing, 16 Minn. 75; State v. Pike, 49 N. H. \$99; State v. Verrill, 54 Me. 408; Commonwealth v. Flanagan, 7 W. & S. 415; Green v. Commonoposith, 94 Mass. 155; Gohrhe v. The State, 18 Texas 568; Commonwoolth v. Miller, 1 Virg. Cas. 810; People v. Murray,

The State, 8 Yerg. 514; The State v. Johnson, 8 Iowa 525. The effect, then, of intoxication is simply to lessen the severity of the punishment that shall follow the crime which by the common law and by our law is defined to be "the unlawful killing, by a person of sound memory and discretion, of any reasonable creature in being and in the peace of the Commonwealth, with malice aforethought, either express or implied." In this we have practically followed the rule of the civil law, which provides that capital punishment should be remitted where the crime had been occasioned by christy: 4 Blackstone's Com. 26. An attempt to assign to it any different effect only involves us in hopoless confusion, as strict reasoning upon the subject would almost lead to the conclusion, that a wrongful act done by one who is in such a state as to be unable to form any deliberate design or to judge of the reasonable consequences of his actions, should be wholly excused, and the penalties of drunkenness merely inflicted; especially so, when we remember that all forms of insanity are, to a greater or less extent, brought about by the patient's own indiscretions, only more remotely and by slower degrees then in the case of common drunkenness. And, indeed, such was the view taken of the matter in France, a few years since, where juries in several instances acquitted prisoners. on the ground of intoxication; the only way in which they could afford relief being by entire exculpation. For as the penal code says nothing about intoxication, but declares insanity without distinction of any kind to be a ground of exoneration from guilt, it was believed that this should be made to include the temporary insanity produced by strong drink. Such reasoning, however, would in its practical effects be too dangerous to the community.

Next, as to the degree of intoxication which should be permitted to reduce the grade of the offence, and thus remit the death penalty. In the practical determination of this question is found much difficulty, and jurymen err quite as frequently as they arrive at reasonable and just conclusions. It is too often the case that juries conduct themselves in their deliberations as if the law were that drunkenness simply, without regard to the character and degree of it, reduces the grade of the crime, and as if they were privileged to return a verdict of murder in the accound degree in case they find that the defendant, when he gave the fatal blow, was at all under the influence of liquor. The evidence in almost every case of felonious homicide discloses the fact, as a matter of course.

that the prisoner at some time during the day or evening upon which the deed was done had been in a drinking saloon and had taken a dram or two, and on the strength of this a verdict of murder in the second degree is brought in. Some of the west heineus cases of wilful and malicious murder thus go unwhipt of justice. the criminal is sent to reside for a few years in the state prison, and is then again let loose upon society, prepared for a repetition of the offence, should it suit the purposes of his depraved life. One wrong determination gives rise to another, and precedent and example are supposed by the minds of jurymen to justify conclusions the most unreasonable. Hence this mockery is centimued until public sentiment becomes aroused by the manifest failure of justice, when the pendulum is likely to swing back as far on the side of severity as it had formerly been raised toward leniency and mercy. But strict attention to the character and degree of the drunkenness will alone insure a just verdict; for, as was said in Commonwealth v. Fletcher, above cited, there never was a greater mistake or a greater libel on the administration of justice than to suppose that drunkenness is an excuse for crime; and it is not all drunkenness that can be permitted to reduce the grade of the offence. On the contrary, we have the authority of Commonwealth v. Hart, 2 Browster 546, for saying that intexication short of a destruction of reason is an aggravation of, rather than an excuse for, crime.

Now, insanity produced by the use of alcoholic liquors may be either permanent or temporary, involuntary or voluntary. Permanent, settled insanity, as it exists in the disease to which the name delirium tremens is given, must of course affect moral and legal responsibility in the same way as any other species of madness, and wholly exculpates the patient who may be so unfortunate as to commit violence when in the throcs of its terrible parezysms. See Wharton's American Criminal Law, Book I., 438, where the subject is fully treated and the leading cases collected and reviewed. Another form of insanity from this same cause, which would seem to be wholly beyond the control of its victim, is that called dipomania, in which there comes upon the patient periodically "an impulse which he has not the power of resisting," that hurries him to an excessive indulgence in strong drink. As seen as this irresistible craving has been satisfied and the effect passed off, he becomes again a most temperate and abstemious person, until the period for another fit has arrived, when the same course ensues: Ray's Med. Jurisp. of Insanity, § 550.

We come now to voluntary, wilful drunkenness, which writers on medical jurisprudence usually distinguish as being of three disthat grades or degrees. The first is that in which the inebriate's memory is unimpaired and his command of self not less perfect than at other times. Thus for he is perfectly capable of forming or earrying out any design with the atmost deliberation and through the promptings of every form of malice, having control of all his faculties, some of them being only more vivacious than usual; honce his moral and legal responsibility is not affected. It is to this state of intoxication, we presume, that reference is made in such cases as Penneylvania v. McFall, 1 Add. 255, where it was said: "Drunkenness does not incapacitate a man for forming a premeditated design of murder, but frequently suggests it." Again, in People v. Robinson, Parker (N. Y.) Cr. R. 285: "If a. drunken man retains mind enough to plan and execute a crime, it is enough to subject him to legal responsibility." In Shannahan . v. Commonwookh, S Bush (Ky.) 464: "Voluntary drunkenness that merely excites the passions and stimulates men to the commission of crimes, neither excuses the offence nor mitigates the punishment."

In the second stage of intexication, all the senses have become enfectived or distorted. The victim finds it impossible to see straight or to hear distinctly without a special effort, what is said to him. His memory fails him just when he needs it most and his perverted judgment leads him into all sorts of absurdities. He conducts himself as if the present only were his, having little regard for the consequences of his acts or for what the next memont may bring forth.

The third and last stage is that in which the individual lesse all consciousness of things about him. Reason is gone and his senses so blanted as to be of little use to him. As to the legal responsibility of one in this latter state no inquiry is necessary, for there can be little possibility of one who is "dead drunk" injuring anybody.

The second and the beginning of the third periods seem to be the degrees of voluntary drunkenness which may be allowed to reduce murder from the first to the second degree. This alone can be said to be a state of intexication which renders a men

"unable to form a wilful, deliberate and premeditated design to kill or of judging of his acts and their legitimate consequences;" and in distinguishing between this state and the first lies the baly difficulty. The method usually adopted by atterneys and sometimes also by judges, is by inquiring into the number of drinks taken. This, of course, can furnish no criterion whatever, as instances have been known of mea who sould drink until the stomach would retain no more and yet not be intoxicated, whilst a single dram may make others mad. The only safe rule is to take some well-established division, such as that of Hoffbauer, which we have followed above, and to permit no case which does not clearly fall within the second or third stages of drunkeaness to receive extenuation, on the ground of incapacity to commit a crime of which an intent to take life is the essential and distinguishing characteristic. J. H. Lara.

PERLABELPHIA, Pa.

RECENT AMERICAN DECISIONS.

Supreme Court of Vermont.

SAMUEL D. PENDAR *. GEORGE J. KELLEY.

Where a statute directs that any note or bill of exchange, "given for a patent right," shall contain those words in the body thereof, and makes it a misdemeaner for any person to take a note for such consideration without the insertion of those words, the primary object of such statute is to enable the maker to defend for fallure of consideration and to give notice to future holders of his right to do so.

Such a statute does not make the note itself illegal and void without those words, nor bring it within the rule that the infliction of a poneity upon an act makes it per as illegal and prevents it from being the foundation of a civil action.

House, when the maker of a note for such consideration emits to have the words inserted, the failure of coincideration is no defence against an impount holder for value.

Assumest on a note in common form, made by the defendant in 1878, payable to Abell or order four months from date, and by Abell sold, and endorsed in blank to the plaintiff before due. The plaintiff bought it in good faith, without knowledge or notice of its consideration, paying comething less than its face.

The county court gave judgment for the plaintiff for the sem he paid for the note, to which the defendant alleged exceptions. The note was given on the purchase by defendant of an interest in a patent for a spring bed-betteen. By a statute of 1870 it is a misdemeaner for any person to take a note for such a consideration, without the words, "given for a patent right," prominently and legibly inserted in the body of the note and above the signature, and a note with those words in it is subject to all defences, if transferred, to which it would be subject if owned by the original payee. The note was taken by Abell in violation of that statute. There was a total failure of consideration.

Allen, for defendant, claimed that the act of taking said note being a misdemeanor, punishable by fine, the note itself is as much illegal and void as if the statute in express terms had declared it to be so, and is so, even in the hands of an innocent holder for value.

Crene, for plaintiff.

The opinion of the court was delivered by

BARRETT, J.—We think the statute in question in this case was designed to enable the maker of any promise or obligation in writing for an interest in a patent right, to forefend himself against indefensible liability under the law merchant. It is left with him whether he will make the selve of the statute available for his own protection or not. If he sees fit to give his negotiable paper in the commercial form, without the "stop-thief" warning in it, it is not for him to go back on some person who has lawfully and innocently dealt with the thief in respect to the paper just as if he was an honest man-the character in which the maker of the paper permitted him to appear with the paper for use and disposal, notwithstanding the maker had lawful opportunity and power to stamp his true character and the character of the paper on the face of the paper itself. The provision for a penalty against the person who shall take such paper without these words of warning in it, is not in like terms, nor on the same reason, as the statutes prohibiting gaming, the sale of intoxicating liquors, and the like, which declare void all contracts upon such consideration. In the present case, it is not criminal, "according to law," to sell an interest in a patent. It is not eriminal, though generally it is intensely foolish, for makilled men to buy such an interest, especially of the smoothtongued, blandly impudent rescale who throng the country, and play "heathen chines" upon rustic greed for money to be made by short out, instead of being earned by plodding and honest into in annual sound assessible. The in man unlawful to a lea a. ?

paper without the prescribed words inserted. The statute was not designed to reflect on the contract, or to affect the legal quality or usableness of the paper. As between the maker and payee, and as between the maker and parties taking the paper overdue, or with notice of defective consideration, there was no need of the statute, unless for the purpose of having the note itself bear conclusive evidence of being subject to defence on the score of consideration. It is mainly to enable the maker to defend against the note when negotiated before due, that the insertion of the words of warning is required. The provision for the penalty was made in tender consideration of the fact (antagonistic to the maxim, that every one is presumed to know the law), that persons not knowing the law, might give notes without that clause inserted. unless the peril of the ponalty should hold the swindler from taking such paper. The additional provision for redress by action points plainly to the view, that no other consequences than these expressed in the statute were to ensue upon the taking of such paper, without that clause inserted. The party to the sale of the patent who takes such paper is subjected to liability to the penalty. and to reimburse any damage accruing to the maker. The main. if not the only way, in which damage would seem likely to secree to the maker would be by some innocent holder of it, when negotiated before due, enforcing payment from the maker. The immunity thus provided against the consequences of ignorance, headlessness or recklessness, or even the foolishness of persons disposed to dabble in the purchase of interests in patent rights, seems to be the full extent intended by the legislature, and quite as much as that class of citizens can reasonably ask. The principle of the case of Passumpsis Bank v. Goos, \$1 Vt. \$15, and of many like cases before and smoo, is applicable in full force in the present case, as showing that the morality involved requires that the defendant should not be permitted to cast on the plaintiff, who is an innocent bend fide holder, the burden from which he might have protected both himself and the plaintiff, but for his own negligence in that behalf. Judgment affirmed.

The decision in the above case recome most unquestionable. It has long been an elementary principle in the law of negetiable paper, that more illegality in the consideration could not be urged as a defence against a bent file helder

for value, and who derived title to the same while it was still current. There is indeed one exception to the rule, where the statute designs the note ruli in the hands of all persons to whom it shall come in the course of negatiation. This is the case in the English and many of the American statutes against gaming and usury, and some others, at the present day: Story on Promissory Notes, §§ 191, 192, and notes.

The defect here seems to have been in the statute, which, of course, the source could not supply. Very likely the statute could not have been obtained with the declaration that security given upon such consideration should be held void in all hands. For it must be confused that there is great tenderness manifested towards that class of thieves and rothers, who name their fill-gotten gains by any species of speculation. There seems to be a kind of regret felt that such men should find their gains turning to askes in their hands. Few men, comparatively, feel prepared to

condomn the dealing in any speculative commodities and to stamp them with the brand of illegality. This may account for the defect in the statute. But the decision is most unquestionable.

Statutes similar to the one referred to in the principal case (which we take to be the parent of the absurd broad) have been passed recently in several of the states, and are beginning to produce their inevitable crop of literation; but we believe the courts have uniformly gives them the same construction—required alike by legal principles and common bonesty—as in the foregoing opinion. See Zimerrmen v. Rote, 78 Penna. St. 188; Nobeler v. Cochem, 14 Am. Law Reg. X. S. 697.

I. P. R.

Supreme Court of the United States. MARY R. KOILL ST AL. V. THE UNITED STATES.

The right of eminent domain is inherent in all governments by virtue of their severeignty. For all purposes required by the constitution, this right exists in the United States independently of any consent of the state in which the property lies.

Bush state can neither control the right nor prescribe the mode of its exercise. Its concent to necessary, if at all, only for the transfer of exclusive jurisdiction and right of logislation after the land has been acquired.

Smile, A state has no power to condown and take lands for the use of the United States. The correct mode is a proceeding by the United States directly.

The word purchase is technically large enough to include an acquicition by taking under the right of emisent domain, but as used in statutes generally, it means only an acquicition by contract between the parties without governmental interference. In connection, however, with the words "at private sale or by condemnation," it includes the authority to take land by virtue of emisent domain.

A proceeding to take lands for public use, is a suit at common law within the imprage of the Judiciary Act of 1709, and where Congress has not prescribed any other tribunal, the Circuit Court has jurisdiction.

In error to the Circuit Court of the United States for the Southern District of Chie.

The opinion of the court was delivered by

STRONG, J.—It has not been seriously contended during the argument that the United States government is without nower to appro-

priate lands or other property within the states for its own uses and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the states. These are needed for forts, armories and arsenals, for navy-yards and light-houses, for custom-houses, post-offices and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a state prohibiting a sale to the federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a state, or even upon that of a private citizen. This cannot be. No one doubts the existence in the state governments of the right of eminont domain; a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised though the lands are not held by grant from the government, either mediately or. immediately, and independent of the consideration whether they would eacheat to the government in case of a failure of heirs. right is the offspring of political necessity, and it is inseparable from sovereignty, unless denied to it by its fundamental law: Vattel, ch. 20, 84; Bynkersbock, lib. 2, c. 15; Kent's Com. 888-40; Cooley on Const. Lim. 584, et seq. But it is no more necessary for the exercise of the powers of a state government than it is for the exercise of the conceded powers of the federal government. That government is as sovereign within its sphere as the states are within theirs. True, its sphere is limited. Certain subjects only are committed to it, but its power over those subjects is as full and complete as is the power of the states over the subjects to which their severeignty extends. The power is not changed by its transfer to another holder.

But if the right of eminent domain exists in the federal government, it is a right which may be exercised within the states, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In Ablemen v. Booth, 21 How. 623, Chief

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Justice TANEY described in plain language the complex nature of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its aphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post-offices and to create courts within the states was conferred upon the federal government, included in it was authority to obtain sites for such offices and for court-houses and to obtain them by such means as were known and appropriate The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain land for public uses. Its existence, therefore, in the grantee of tha power ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amondment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion that on making just compensation it may be taken? In Cooley on Constitutional Limitations, p. 526, it is said: "So far as the general government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions, as must sometimes be necessary in the case of forts, light-houses, and military posts or roads, and other conveniences and necessities of government, the general government may exercise the authority as well within the states as within the territory under its exclusive jurisdiction, and its right to do so may be supported by the same reasons which support the right in any case; that is to say, the absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties or of any other authority." We refer, also, to Trembley v. Humphrey, 28 Michigan 471; 10 Potors 728; Dickey v. Turnpike Co., 7 Dana 118; McCullough v. Maryland, 4 Wheat, 429.

It is true, this power of the federal government has not heretofere been exercised adversely, but the non-user of a power does not disprove its existence. In some instances the states, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the states. Such was the ruling in Gilmer v. Lime Point, 18 Cal. 229, where lands were condemned by a proceeding in a state court and under a state law for an United States fortification. A similar decision was made in Burt v. The Merchants' Insurance Co., 106 Mass. 856, where land was taken under a state law as a site for a post-office and sub-treasury building. Neither of these cases denies the right of the federal government to have lands in the states condemned for its uses under its own power and by its own action. The question was whether the state could take lands for any other public wee than that of the state. In Trombley v. Humphrey, 28 Mich. 471, a different doctrine was asserted, founded, we think, upon better reason. The proper view of the right of eminent domain seems to be that it is a right belonging to a sovereignty to take private property for its own public use and not for the use of another. Beyond that, there exists no necessity, which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a state. Nor can any state prescribe the manner in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

It may, therefore, fairly be concluded that the proceeding in the case we have in hand was a proceeding by the United States government in its own right and by virtue of its own eminent domain. The Act of Congress of March 2d 1872 (17 Stata at Large 39), gave authority to the secretary of the treasury to purchase a central and suitable site in the city of Cincinnati, Ohio, for the erection of a building for the accommodation of the United States courts, custom-house, United States depository, post-office, internal revenue and pension offices, at a cost not exceeding \$300,000, and a provise to the act declared that no meany should be expended in the purchase until the state of Ohio should code its jurisdiction over the site and relinquish to the United States the right to tax the property. The authority here given was to

stion should be made in a judicial tribunal, or in a judicial preceding, although it is admitted the legislature might authorise the valuation to be thus made in either case. If the supposed analogy be admitted it proves nothing. Assessments for taxation are specially provided for, and a mode is prescribed. No other is, therefore, admissible. But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law, and hence, as the government is a suitor for the property, under a claim of legal right to take it, there appears to be no reason for holding that the proper circuit court has not jurisdiction of the suit, under the general grant of jurisdiction made by the Act of 1789.

The second assignment of error is that the Circuit Court refused the demand of the defendants below, now plaintiffs in error, for a separate trial of the value of their estate in the property. They were lesses of one of the parcels sought to be taken, and they demanded a separate trial of the value of their interest, but the court overruled their demand and required that the jury should appraise the value of the lot or parcel, and that the lessees should in the same trial try the value of their leasehold estate therein. In directing the course of the trial the court required the lessor and the lesses each separately to state the nature of their estates to the jury, the lessor to offer his testimony separately, and the lesses theirs, and then the government to answer the testimony of the lessor and the lessoes, and the court instructed the jury to find and return separately the value of the estates of the lessor and the lessees. It is of this the lessees complain. They contend that whether the proceeding is to be treated as founded on the national right of eminent domain, or on that of the state (its concent having been given by the enactment of the state legislature of February 15th 1878, 70 Ohio Laws 86, sect. 1), it was required to conform to the practice and proceedings in the courts of the state in like cases. This requirement, it is said, was made by the Act of Congress of June 1st 1872 (17 Stats. at L. 522). But admitting that the court was bound to conform to the practice and proceedings in the state courts in like cases, we do not perceive that any error was committed. Under the laws of Ohio it was regular to metitate a joint proceeding against all the owners of lots proposed to be taken (Giory v. C. W. & T. Railroad Co., 4 Ohio St. 808), but the 8th section of the state statute gave to " the owner or owner.

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of each separate parcel" the right to a separate trial. In such a case, therefore, a separate trial is the mode of proceeding in the state courts. The statute treats all the owners of a parcel as one party, and gives to them collectively a trial separate from the trial of the issues between the government and the owners of other parcels. It hath this extent, no more. The court is not required to allow a separate trial to each owner of an estate or interest in each parcel, and no consideration of justice to those owners would be subserved by it. The Circuit Court, therefore, gave to the plaintiffs in error all, if not more than all, they had a right to ask. The judgment of the Circuit Court is affirmed.

FIELD, J., dissenting.—Assuming that the majority of the court are correct in the doctrine announced in the opinion just read, that the right of eminent domain within the states, using those terms not as synonymous with the ultimate dominion or title to property, but as indicating morely the right to take private property for public uses, belongs to the federal gevernment to enable it to execute the powers conferred by the Constitution; and that any other doctrine would subordinate, in important particulars, the national authority to the . caprice of individuals or the will of state legislatures, it appears to me that provision for the exercise of the right must first be made by legislation. The federal courts have no inherent jurisdiction of a proceeding instituted for the condemnation of property, and I do not find any statute of Congress conferring upon them such autherity. The Judiciary Act of 1789 only invests the circuit courts of the United States with jurisdiction, concurrent with that of the state courts, of suits of a civil nature at common law or in equity: and these terms have reference to those classes of cases which are conducted by regular pleadings between parties, according to the established doctrines prevailing at the time in the jurisprudence of England. The proceeding to ascertain the value of property which the government may does necessary to the execution of its powers, and thus the compensation to be made for its apprepriation, is not a suit at common law or in equity, but an inquisition for the accertainment of a particular fact as preliminary to the taking, and all that is required is that the proceeding shall be conducted in some fair and just mode, to be provided by law, either with or without the intervention of a jury, opportunity being afforded to parties interested to present evidence as to the value of the preperty and

Yes. XXIV .-- 66

of their right of eminent domain, is often had before commissioners of assessment or special boards appointed for that purpose. It can hardly be doubted that Congress might provide for inquisition as to the value of property to be taken by similar instrumentalities, and yet if the proceeding be a suit at common law, the intervention of a jury would be required by the seventh amendment to the Constitution.

I think that the decision of the majority of the court in including the proceeding in this case under the general designation of a suit at common law, with which the circuit courts of the United States are invested by the eleventh section of the Judiciary Act, goes beyond previous adjudications and is in conflict with them.

Nor am I able to agree with the majority in their opinion, or at least intimation, that the authority to purchase carries with it authority to acquire by condemnation. The one supposes an agreement upon valuation and a voluntary conveyance of the property; the other implies a compulsory taking and a contestation as to the value: Beckman v. The Saratopa & Schancotady Railroad Co., 8 Paige 75; Railroad Co. v. Davie, 2 Dev. & Batt. 465; Willyard v. Hamilton, 7 Ham. (O.) 458; Livingston v. The Mayor of New York, 7 Wond. 85; Koppikus v. State Capital Commissioners, 16 Cal. 249.

For these reasons I am compelled to dissent from the opinion of the court.

United States District Court, Western District of Tennesses.

EX PARTE WADDY THOMPSON.

The United States courts have power under the writ of habens earpus to discharge persons from the custody of state officers, where it appears that they are held under a state law which seeks to punish them for executing a law of the United States, or where the act for which they are held was done in pursuance of the process of a Policul opera.

But where a party is in eastedy of a state officer under an indictment for larcony and sets up as a justification for the act complained of a writ of replevia issual from a United States court, the latter court will on heloss corpus inquire into the fact whether its writ was frankulently obtained for the purpose of carrying of

We are indebted for this case to L. B. McFarland, Bog., of counsel for respondent.—Ep. Ast. LAW Rue.

the property, and if satisfied of that fact, will remand the relator to the custody of the state officer.

A writ regular on its face is a justification to the officer to whom it is addressed for everything that he may lawfully do under such an authority, but this rule does not extend to a party who has procured the writ by fraud.

This was a writ of habeas corpus addressed to the sheriff of Shelby county, Tennessee, requiring him to produce before the judge of this district the body of Waddy Thompson, alleged to be unlawfully detained by the respondent. In obedience to the writ the sheriff produced the petitioner, and returned that he held him by virtue of a capias issued upon indictments for largeny and horse-stealing found by the grand jury of Shelby county. This return was neither traversed nor confessed and avoided as contemplated by the Revised Statutes, but the facts upon which Thompson claimed his discharge were substantially as follows:—

That Mrs. Francis Wilkerson, a citizen of Missouri, having a claim to the possession of certain goods and chattels unlawfully detained by certain parties in Memphis, Tennessee, and having failed to obtain the same upon repeated demands, or to receive any satisfactory accounting therefor, on October 20th 1874, instituted an action of replevin in the Circuit Court of the United States for this district, intrusting the inauguration and conduct of the suit to one Arnett, an attorney of St. Louis, to whom she gave a power of attorney authorizing such suit; and to be aided, if necessary, by the relator, who was her son-in-law, and who also held a general power of attorney from her in relation to her matters of business; that Arnett made the oath required by statute, and gave a bond, with Elijah Smith and Benjamin F. Carroll as sureties, whereupon process was issued requiring the marshal to take possession of the property in question and deliver it to the plaintiff, or her agent; that the writ was partially executed by the mershal taking possession of a portion of the goods and delivering them to Arnett. The petition further set forth that one Hendriz, one of the defendants in the replevia, made eath before a clerk of this court of the insufficiency of the bond, and obtained from the district judge as order suspending further proceedings; that horses and other property which had been placed in the possession of Arnett, were by his direction placed on a steamboat for the purpose of delivering them to his principal in Missouri; that these goods were landed on the Arkansas shore, a few miles above Memthe other Handaly appropriately by ground appropriate w

a steam tug, boarded his boat, and, by intimidation, induced Arnett and the relator to return the property that had been delivered to them by the marshal, under an agreement that the title to the same should be settled by civil suits then pending. The goods and horses were accordingly brought back and delivered to the defendants in the replevin suit; that, notwithstanding the writ had been duly issued by the clerk of this court, and executed by the marshal of this district, the defendants in the replevin suit procured indictments against the relator, Arnett, and the sureties upon the bond for perjury and larceny; that these indictments were intended to frustrate and delay the plaintiff in the replevin suit in the procecution of her remedy by intimidating relator, and thereby to cust the Circuit Court of the United States of its rightful jurisdiction ever this suit, and to drive the plaintiff to a remedy in the state court where by local influence defendants hoped to obtain an unfair advantage; that relator having given bonds upon these indictments, and returned to his home in Missouri, the firm of Hendrix, Carter & Co., defendants in the replevin suit, instituted an action against the relator and Mrs. Wilkerson, for malicious prosecution, in bringing this action of replevin, and that in this suit the property which she was attempting to recover was attached. He further charged that the criminal court had no jurisdiction to try him upon these indictments, and that he was unjustly restrained of his liberty; that if guilty of any wrongful act whatever it was against the peace and dignity of the United States. He further claimed that he had a perfect right to do everything that was done towards the taking of the property named in the replevia, and was therefore not guilty of larceny or horse-stealing, and that the United States courts have exclusive jurisdiction over him for the punishment of the effence, if any there be.

T. M. Brown, W. C. Folkes and J. J. Du Bose, for the relator.

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L. E. Wright, attorney-general, L. B. Herrigan and L. B. McFarland, for the sheriff.

Brown, District Judge.—It is claimed by the relator that as the sheriff made no answer to the facts set forth in this petition they are to be taken as true, and that he is therefore entitled to his discharge. I think, however, he misapprehends the law upon this point. The petition is simply the basis upon which the writ is issued. No copy of it is required to be served upon the respondent in the writ, who is required to make his return to the writ itself, and not by way of answer to the petition, which has performed its office as soon as the flat is signed. A return may be traversed or confessed and avoided by way of affidavit or oral testimony, but I know of no practice requiring an answer to be made to the petition itself. It would have been proper for the relator to confess and avoid the return by repeating in his denial the facts set up in the petition. This is evidently contemplated by section 760 hereafter quoted, though I know of no practice requiring it to be done. The testimony was taken as if the issue had been made upon the return, and as no objection was interposed to this course until the argument of the case, I shall proceed to dispose of it as if an issue had been made by the pleading.

By section 758 of the Revised Statutes, "the writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody " " for an act done or omitted, in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof." Although the words used are those of exclusion, there is no doubt of the power of this court to issue a writ of habeas corpus in cases falling within the above prevision.

By section 754 application must be made "by complainant in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known."

By section 760 the petitioner "may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under eath."

By section 761 the judge "shall proceed in a summary way to determine the facts of the case by hearing the testimony and argument, and thereupon to dispose of the party as law and justice require."

The section first above quoted is substantially a re-encouncing of the Act of 1888, commonly known as the "Force Bill," and was adopted in view of the nullification laws of South Carolina, by which an attempt had been made to punish officers of the United States for executing the laws of Congress within that

state. But it is now settled that this act gives relief to one in state custody not only when he is held under a law of the statewhich seeks expressly to punish him for executing a law or process of the United States, but also when he is in such custody under a general law of the state, which applies to all persons equally. where it appears he is justified for the act done, because done in pursuance of the process of a United States court (United States en rel. Roberts v. Jailer of Fayette County, 2 Abbott U. 8. 277). At the same time the power given to the Federal courts thus to arrest the arm of the state authorities, and to discharge a person held by them is one of great delicacy, and should only be exercised where it clearly appears that justice demands it. Such power has rarely been invoked, except under circumstances tending to show strongly that the state was about to use its autherity to oppress the party imprisoned in defiance of the laws of the general government. Nothing could render the act more justly edious than to permit the writ of habeas corpus to be employed to relieve a party from the legal consequences of crime against the sovereignty of a state.

If it appears, however, that the relator was justified by the process of this court in doing what he has done, the sections above quoted authorise and require his discharge. The testimony takes at considerable length reveals substantially the following facts:

The relator, whe was son-in-law of Mrs. Wilkerson, holding a general power of attorney from her, came to Memphis from Missouri, in the month of October 1874, accompanied by one Arnett, an attorney-at-law at St. Louis, for the purpose of asserting her claim to the property covered by the writ of replevin. With the view of hastening the disposition of the case, it was conceded by the learned counsel for the state, that the relator, in good faith, supposed that Mrs. Wilkerson was entitled to the possession of the property covered by the writ. On arriving at Memphis, he and Arnett put up at the Commercial Hotel, where they first met Carroll, whe afterwards became one of the suretics upon the replevin hand. * * * * *

[Here the learned judge reviewed the testimony as to the means used in getting worthless securities on the replevia bond.]

After one or two ineffectual efforts he finally precured the services of an attorney, who drew an affidavit awarn to by Arnett, claiming the possession of the stock of liquous, and safe and con-

tents in the store of Hendrix, Carter & Co., the entire stock in trade of a firm of nurserymen, and three horses belonging to parties not connected in any way with the other defendants, though the horses had been purchased of Hendrix, Carter & Co. It may also be observed here that Hendrix, Carter & Co. were in no way connected with the owners of the nursery, and that plaintiff proceeding properly would have been compelled to bring at least three, and probably four or five separate suits to recover possession of these distinct parcels. Upon this affidavit a sweeping writ of replevia was issued against defendants, commanding the mershal to take possession of all the property named in the writ, and to deliver the same to the plaintiff or her agent. Taking Arnett and his two sureties to the clerk's office, a bond was signed, prior to the issuing of the writ, by Arnett, as attorney for the plaintiff, by Homer B. Carroll, signing his name as Benjamin F. Carroll, and by Elijah Smith. whose true name, and, indeed, whose very existence is unknown. Each of these sureties swore that he was worth the sum of \$30,000 in real estate in Shelby and Tipton counties. This was done in the presence and by direction of Thompson, who knew perfectly their utter insolvency. Shortly afterward Arnett advised Carroll to get out of town as soon as possible, which he proceeded to do by hiring a skiff to take him across the river. To secure the speedy service of the writ and transportation of the property, relator hired a steamboat plying between Memphis and Mound City. Arkaness, to wait over her usual time of departure, promising to pay ten dollars per hour for her detention. Deputies were dispatched from the marshal's office to different parts of the city where the property covered by the writ was lying. Six furniture wagons were sent to the nursery and about a thousand pots of flowers, besides knives, forks and spoons and other articles were loaded upon them and hurried away to the steamer, which was lying in waiting to take them across the river. Several horses were seized by another deputy, who at ence drove them on board the steamboat. Fifty or sixty drays were cent to the store of Hendrix, Carter & Co., for the purpose of removing their entire stock in a similar way, and leading it upon the boat. The relater formerly had a desk in their establishment, know the office hours of the partners, and instructed the marshal not to go there until the book-keeper had gone away and looked the cafe, and the steamer was on the point of departure. When the marshal announced his intention to Hendrix of seising all the goods in his establishment, Hendrix asked for a little time, went to the clerk's office to look at the bond, satisfied himself the sureties were insolvent, and made affidavit of the fact, when the district judge was telegraphed to to stop proceedings. The marshal refused to place the property on the boat, but put custodians in charge during the night. His suspicions were excited none too soon. Great anxiety was manifested by Thompson to get possession of this stock, but finding himself foiled the beat was compelled to put off without it. It proceeded to Mound City about sun-down, with Thempson, Arnott and Carroll, who had dismissed his skiff, on board. After arriving at Mound City, some of the defendants made up a party. hired a steam tug, went in pursuit, and compelled the return of the property. Relator afterwards returned to Memphis, saw the council employed by Hendrix, Carter & Co., confessed to him the bond was bogus and fraudulent; said they had him where he meant to get them, and promised if they would let him out he would farnish information to hold the clerk and marshal. I take pleasure in saying there is not the slightest evidence to show that either of these officers or their deputies acted corruptly or in bad faith, although in view of the magnitude of the bond a little more care in approving it would have been commendable. The writ of replevin was soon after dismissed and his claim to the property abandoned.

This is but a bare outline of the facts fully proved—facts which the relator made but feeble attempt to deny. I am forced to the conclusion that it is a case of gross and infamous fraud practised upon the court.

It is claimed by the relator, however, that admitting this to be true, he is still entitled to his discharge, inasmuch as the writ of replevin was valid upon its face. There is no question that a writ valid upon its face will protect the officer executing it, notwith-standing it may have been irregularly issued, or may he veidable for want of jurisdiction. There is a clear distinction, however, between the officer who executes the writ and the party who procures it to be issued; as against the latter, it may be shown to be void from facts not appearing upon its face. From a multitude of cases drawing this distinction, I cite the following:

Lavassel v. Boughton, 5 Wend. 178; Lodes v. Phelps, 18 Wend. 48; Adhine v. Brewer, 8 Cow. 206; Whitney v. Schenfelt, 1 Don.

594; State v. Weed, 1 Fost. 202; Rogers v. Mulliner, 6 Wood. 597; Taylor v. Iresk, 7 Cow. 249.

By the Code of Tennessee, before a writ of replevin can be issued a bond must be filed in double the value of the property covcred by the writ. Whether the writ is totally void without such bond it is perhaps unnecessary to consider. There is no doubt that a writ of attachment issued without such bend where the statute requires it, is wholly void (see Drake on Attachments, &c.), and it is presumed that the same rule would be held to apply to writs of replevin, although in some states, where a bond is not required before the issuing of the writ, it is held that the writ is not thereby invalidated, if the bond is executed before the property is delivered to the plaintiff. There is a clear distinction between the statutes which require the bond to be executed before the property is delivered over, and those which require it before the issuing of the writ. In this case no bond was ever given. It is not merely a case of insufficiency of surcties, which may be renewed by order of the court. The relator procured the execution of the band by sureties, whom he knew to be utterly irresponsible and at least one of whom forgod the signature of a fictitious person.

The position assumed by relator is that if the writ upon its face authorized the taking, which is the subject of the larceny for which he is indicted, he "is entitled to his discharge, notwithstanding the writ was procured by perjury, and used for the purpose of committing a larceny. Counsel cannot have fully apprehended the consequences of this doctrine. May a deputy marshal, helding a espice of this court, deliberately murder the party he is seeking to arrest? There is no general power in the Federal courts to punish murder, and if discharged from the custody of the state, his crime would go practically unpunished. This court I think is bound to inquire into the legality of the use as well as the validity of the process itself. This was the view evidently taken by the learned judge for the District of Kentucky in the Reberts case above cited.

In Commonwealth v. Low, Thacher's Criminal Cases 477, it was held that if a man, having a right of action, makes use of a process which he knows he has no right to adopt, to get the property of his debtor, and with intent to defraud him, it is largeny.

It is well settled that a combination of two or more to accom-Vos. XXIV.—67 plish a lawful purpose by unlawful means is indictable as a conspiracy. Says Lord HALE (P. C. 507): "A. hath the mind to get the goods of B. into his possession, privately delivers an ejectment, and obtains judgment against a casual ejector, and thereby gots possession and takes the goods; if it were animo furandi, it is larcesy." So Lord Coke (8 Inst. 108): "If a man seeing the horse of B. in his pasture, and having a mind to steal him, cometh to the sheriff, and pretending the horse to be his, obtaineth the horse to be delivered to him by replevin, yet this is a felonious and fraudulent taking."

I have not lest sight of the concession in this case that relator supposed that he was entitled to the possession of this property. The question here is not whether he was entitled to the possession of this property; nor whether he was guilty of larceny in obtaining possession; not even whether he was entitled to possession, but whether he was justified by his writ in obtaining this possession. Now, nothing is better settled in the law of trespass than that an officer entitled to levy upon property becomes a tresposeer at initio by an abuse of the process. I am natisfied in this case that the relator commenced this suit not for the purpose of asserting a bend fide claim to the property, but of spiriting it away under the forms of law, and disposing of it before proceedings could be taken for its reclamation. It would be a strange interprotation of the law, if, after having been guilty of forgery, fraud and subornation of perjury in procuring the process of this court, he could still claim to be protected by it in carrying out his schemes. I held, then, that, although the marshal was protected by this writ in what he did in execution thereof, yet as to the relator in this case, it was fraudulent and void, and that so far from being entitled to protection by this court, his case should be laid before the next grand jury of this district, for such action as it may see fit to take, and the district attorney is directed to see that this is done. Provided, however, that no action be taken on any indictment until he shall have been discharged by a state court.

It results that the prisoner must be remanded to the custody of the sheriff of Shelby county.

Supreme Court of Michigan. WILLIAM WEAVER of THE PROPLE.

A judge has power to suspend sentence, where the circumstances, in his opinion, render the offence trifling and the law has imposed no minimum punishment for st.

In general, where a sentence has been emitted by the judge who tried the case, another judge may impose the proper sentence at a subsequent time.

But where rentence has been suspended by a judge under circumstances that indirate his opinion that no punishment should be inflicted, as, c. g., where he has discharged the prisoner on his own recognisance in a nominal amount, a subsequent sentence by a different judge is erroneous and will be reversed.

ERROR to Van Buren Circuit.

Weaver, on the 8th day of July 1874, pleaded guilty to a charge of malicious injury to a dwelling. The case was pending in the Circuit Court for the county of Van Buren, and the plea was put in before Hon. J. W. Stone, Circuit Judge. On the same day Judge Stone suspended sentence until the first day of the next term, which was the first Monday of October 1874, the respondent being allowed to give his own recognisance to appear at thet day, in the sum of one hundred dollars. The sentence was not further suspended, nor the recognisance forfeited, and the defendant was not called up for sentence at the return term, but continued at liberty. On the 25th day of October 1875, Judge Tennant, a judge of another circuit sitting temporarily, sentenced Weaver to two years and six months imprisonment in the state prison. On this error is brought.

W. Soott Beebe, for plaintiff in error.

Andrew J. Smith, Attorney-General, for the People.

The opinion of the court was delivered by

CAMPBRLL, J.—It is not necessary in this case to discuss the power of a different judge to give sentence where it has been emitted, and where it does not appear that such emission was designed to interfere with punishment. There has been some dispute as to the best course to pursue under such circumstances. Lord HALE, not considering the abstract question, said it was not his custom to give such sentences in cases of felony. But generally the question seems to become important in view of some action or expression of the trial judge indication his continents.

It is said with much force that inasmuch as there can be no sentence without the joint belief of the jury in the prisoner's guilt, and of the judge in the deserts of the offender, where he has any discretion to exercise, the views of the judge are to be respected.

In the present case there was no fixed penalty. It might be imprisonment in the state prison, or it might be a short imprisonment in the county jail, or a fine not exceeding five hundred dollars, but with no minimum amount required to be imposed. In other words, it was recognised by the legislature that such offences might be of trifling enormity, and not worthy of serious notice.

Sentences may be suspended for various purposes. It may be for the purpose of allowing steps to be taken for a new trial or other relief, or it may be with a view of letting the offender go without punishment. The release of a defendant on his own recognisance and without sureties, in a merely nominal amount, signifies usually the latter purpose. It at least is a plain assertion of the judge that he did not regard the offence as one that should receive a serious punishment. The failure to take steps during the October Term of 1874, was a practical abandonment of the prosecution, and corroborates the opinion that such must have been understood as the object of the suspension, and as the record stands it is fairly to be inferred it was intentional. sentence a prisoner to the penitentiary under such circumstances. and when the trial judge has distinctly said he ought not to be so sentenced, is not supplying his omissions, but is overruling his decision. This we think is not admissible, and the sentence was unactherised, and the judgment must be reversed, and the prisoner discherged.

Court of Appeals of New York.

WILLIAM LEETCH, Respondent, v. ATLANTIC MUTUAL INSUR-

In all contracts of marine incurance there are certain implied conditions which are of the same force as if written in the policy, and are distinguishable from more representations.

Among these conditions, in case of an insurance on cargo, is that it shall be stowed in a safe and proper manner and in the usual and enstomery place for the carriage of goods of the kind insured. Any breach of this condition by which the risk as varied and the perils increased evolds the policy.

The testimony of experts and particularly of underwriters is always admissible upon the question of the materiality of circumstances affecting the risk.

Gold being stowed in the rear of the vessel under the carge, and the testimony being clear that that was not the customery place and was a place of gresser has and than the cabin, where coin is usually stowed, the judge should have directed the jury, as a matter of law, that that was a material variation of the sisk.

This was an action on a policy of marine insurance. The material facts were that gold was shipped at Laguna, consigned to New York, and was, at the time of lading, placed in the rear of the vessel, outside the cabin and under the ballast. At Minatitlan a cargo of mahogany was taken on board and filled the held, thereby rendering the gold inaccessible. The vessel met with disaster and was abandoned at sea. The gold could not be reached and was not saved. Subsequently the vessel was found and towed into port, but on unloading no gold was found.

Samuel Hand and Wm. G. Cheste, for appellant.

W. J. A. Fuller and E. L. Fancher, for respondent.

The opinion of the court was delivered by

ALLEN, J.—The question of most prominence, as it is the most important in this case, is as to the validity of the policy upon the gold, and the rulings of the learned judge at the trial in respect There is no conflict of evidence or substantial dispute as to the facts upon which its validity is challenged by the defendant. The claim is that the specie was not stowed on board the vessel in the usual and customary place for the carriage of freight of that description, but that it was placed in an unusual part of the vessel, by which the peril was greatly increased and the risk essentially varied from that assumed by the underwriter. The evidence of the shipmasters, given upon the trial, was uniform, that the usual place for the carriage of coin or specie of any kind was either in some proper place in the cabin or in that part of the run of the vessel immediately under the cabin, and accessible from it by an opening in the floor with a trap properly fitted, so that it might be at all times under the immediate watch and care of the captain, and only accessible from the cabin. The masters of vessels, who were examined as witnesses upon this subject, had been engaged in trade to Mexican and South American ports, as well as to other ports and places, and all agreed that the usual and proper place for the safe-keeping of coin, carried as freight, was either in or under the cabin, as stated. It was proved by one or more of the witnesses, and not disputed, that the only exception to this usage was when specie was taken out of the country clandestinely, in violation of the revenue laws, and to evade the payment of export duties, when it was sometimes concouled among the cargo or in other parts of the vessel, but never under the cargo. In such case, as soon as the vessel was at sea and the pilot had left the ship, the cein was invariably taken from its temporary place of concealment and deposited in the usual place. The same witnesses, and the only witnesses upon the subject who were experienced as navigators and masters of vessels, agreed that a deposit of coin under the ballast or under the cargo was unusual and increased the hazards and risk of less to which it was exposed. In case of disaster, it was less accessible and could not be saved in whole or in part, as it might under ordinary circumstances and as usually stowed. This fact is so palpable, upon a more statement of the different modes and places of stowage, that it needed not to be proved by experts. It was not denied that while under the freight, especially ' such as that laden on board the vessel in this instance, it was safer from barratry or theft than when stowed in the usual place; but even in such case, the risk of theft was greater when the vessel was unladen, and during that process, from its liability to be taken by stevedores and others who would have access to it. The claim of the plaintiff is that the gold was lost, not from the perils said to be diminished by the stowage resorted to, but by that which was confessedly increased. The gold, in the present instance, was suffered to remain under the ballast from the time it was placed there at Laguna, until the vessel sailed, and during the voyage from that port to Minatitlan, and until the cargo of mahogany was laden on board at the latter port. During all that time it is selfevident that it was exposed to equal if not greater peril from barratry and theft than if stowed in the usual place. There is no evidence, except that of the plaintiff, that the gold was seen on board the vessel after it was first laden at Laguna. Whether there was any necessity for the stowage of the gold in the held of the vessel, outside of the cabin, while the vessel remained upon the coast and at the ports of Laguns and Minatitlan, which would justify a deviation from the usual course of lading, and of which the underwriters might be presumed or were bound to have known. and thereby to have assumed the varied risk, cannot be determined

upon the present record. These questions were not tried or decided by the trial court. The facts proved by these witnesses, and which are not controverted by any witness upon the trial, clearly and conclusively establish that the actual risk upon the gold was not the same as it would have been if stowed in the usual place, and that the risk of loss in case of disaster at sea, the peril by which it is claimed the gold was lost, was increased.

In addition to this evidence, several underwriters were called as experie, and they were unanimous in the opinion that the carriage of specio under the ballast and carge did increase the risk, and that the fact that it was so carried was material to be known by an underwriter, and would affect his judgment as to accepting the risk; and, if accepted, the rate of premium. But a single underwriter was called by the plaintiff, and his evidence did not detract from the force of or conflict with that given in behalf of the defendant. He testified that a stowage under the cargo would (in his own language) "of course," in some respects, increase the risk so far as the perils of the sea were concerned, and only diminish it as against barratry or theft on the part of the mariners. He also stated that when so stowed the risk would be different in character and different in kind from what it would be if the gold were stowed in the cabin or in the run immediately under the cabia.

The plaintiff, bimself a witness upon the trial, stated that he had frequently shipped specie and carried it under the cargo and the timbers, in out sacks, in the cook's coppers, and almost everywhere in the vessel where he deemed it most prudent, but he did not state under what circumstances be had so carried it, or that it was usual so to do, or that when so carried it was insured. Under objection that he had not shown himself competent to testify as an expert, he was permitted to testify that in his opinion the risk would not be any greater for the safety of the specie whether stowed under the cargo or in any other place on the vessel, and that it would be safer under the cargo against barratry and theft. His testimony was not in conflict with, but rather in corroboration of, the testimony of the other witnesses, except in the statement that the gold was equally safe in any part of the vessel. It is well settled that the testimony of experts, and especially of underwriters, as such, is admissible upon the question of materiality of circumstances affeeting the rick: McLanchen v. The Universal Inc. Ob., 1 Peters

170; 8 Kent's Com. 284. When evidence of this character is nocessary for the reason that the fact is not sufficiently obvious to enable the court to decide it without aid, the testimony is to be treated as testimony of credible witnesses upon any other fact; and if there is no conflict, the fact of materiality or immateriality must be held as all the witnesses testify. If there is a difference of spinion, it then becomes a question of fact for the jury. In every contract of marine insurance there are certain implied stipulations and conditions which are of the same obligatory force as between the parties as if expressed in the policy, and make a part of the contract, and are distinguishable from mere representations: Arnould on Inc., 4th ed., 589. Among the conditions in case of an insurance upon cargo implied by law, is that it shall be stowed in a safe and proper manner, and in the usual and customary place for the carriage of goods of the description insured, and any breach of this warranty by which the risk is varied and the perils insured against increased, vitiates the policy. A policy upon merchandise is vitiated by a breach of the implied warranty that the conveying ship is seaworthy, although the shipper of the goods is innocent and has no interest in the ship: Arnould on Ins. 591. The insurers, assuming risks which the insured is unwilling to bear, can only be held to those risks which they have voluntarily and knowingly undertaken, and the insured has no right to substitute any others in the place of those assumed: 2 Pars. on Ins. 2; Hartley v. Buggin, 3 Doug. 39; Maryland Ins. Co. v. Le Roy, 7 Cranch 26. In Blackett v. The Royal Ez. Assurance Co., 2 C. & J. 244, Lord LYNDHURST, C. B., says: "On an insurance upon goods, the underwriter is entitled, in general, to expect that they shall be carried in that part of the ship usually appropriated to the stowage of goods, not in a more dangerous part," and adds: "If he were to be made answerable for extraordinary peril, he would be answerable for a peril he had not contemplated, and for which he had not received an adequate compensation." To this principle may be traced the rule which excludes deck cargoes from the protection of an ordinary policy of insurance: 1 Pars. on Marine Ins. 529. In Brooks v. The Oriental Inc. Co., 7 Pick. 259, the underwriter was held not to be liable upon a valued policy upon a ship for a hawser lost everboard, which was stowed in the boat on deck instead of having been stowed in the hold with the cables on the passage, the court saying that it was a matter of common information that

it should have been stowed in the hold. Here we have the uncontradicted evidence of an established usage as to the proper place for the stowage of gold and the patent and obvious fact that the usual place is the safer place for carrying it. It is only where there is a doubt as to the materiality of a representation or of any deviation or change of risk, that it falls exclusively within the province of a jury. A nonsuit was sustained by the court in bane, in the Taunton Copper Co. v. The Merchants' Ins. Co., 22 Pick. 108, upon the ground that the merchandise, which was copper in pigs, had been stowed upon deck instead of being put under deck, and this, notwithstanding a general usage for forty years to carry goods not liable to be injured by dampness on deck, was proved. The court were of the opinion that the usage stopped in limine, and that the insured should have proved, in addition, that it was usual for underwriters to pay for goods when carried on deck. The plaintiff's claim and proof in this case is equally defective. There is no pretence that any underwriter has over paid for coin lost when stowed in this way, and insured by a policy in the ordinary form. The question in Richards v. Murdeck, 10 B. & C. 527, was as to the materiality of a direction from the insured to the broker, to wait thirty days after the receipt of the letter giving the directions before effecting the insurance. It was held that evidence of the underwriter's opinion was properly received, and that even without it the jury would have been bound to find that that part of the letter not communicated to the underwriters was material, and that consequently the policy was void. Da Coots v. Edmonds, 4 Camp. 148, was an action upon a policy of insurance on forty carboys of vitriol, and the plaintiff had a verdict upon proof of usage to carry vitriol on the deck, of which usage the underwriters were bound to take notice. Lord ELLENDONOUSE instructed the jury that the underwriters were not liable if the goods were carried on deck without such usage, or if they were not stowed there in a skilful and proper manner. The only questions left to the jury were as to the usage, and whether, if the usage was established, the carboys were properly stowed. The question of materiality was not submitted. See also, Merchants' Inc. Co. v. Alger, 82 Penna. St. 880; Marshall on Inc. 348, 849; Milheard v. Hibbard, 8 A. & B. (N. S. Q. B.) 120; The Deleusare, 14 Wall. 579. The Commission of Appeals in Appleby v. The Aster First Inc. Co., 54 N. Y. 258, reversed a judgment in an action

upon a policy of fire insurance, for error of the judge at circuit, in refusing to direct a verdict for defendant upon the ground that the risk had been materially varied and increased by the introduction into the building of the business of finishing chairs which had been manufactured in the rough elsewhere. court held that it was not a case to be sent to a jury, but that the defendant was clearly entitled to a verdict and judgment. Upon a reconsideration of the case upon a motion for a re-argument, the court say: " As an ordinary rule it may be safely assumed that upon an undisputed state of facts, the court in which an action is pending may render the judgment which the law requires, without the aid or advice of a jury, and that such action by the court does not violate any of the maxims of the law." The fact being undisputed that the gold for which this action was brought was not stowed in the usual place, but in another part of the vessel, where it was exposed to a different risk (and to increased basard, save only against barratry and theft) from that to which it would have been exposed had it been stowed where the defendant had a right to assume it would be stowed, it follows, as a very plain proposition, that the stowage under the ballast and cargo was a fact material to the risk, and the judge should have so charged the jury as requested. The judge should also have charged, as he was requested. to do, almost in the very language and according to the evidence of the only underwriter examined as an expert in behalf of the plaintiff, that the risks to which the gold was exposed in this unusual place, were different in kind or degree from those to which it would have been exposed if stowed in the usual place for the stowage of specie. If these questions depend upon the testimony of witnesses the evidence was conclusive, and a verdict in disregard of it should have been set aside, and the defendant was therefore entitled to a direction for a verdict in accordance with it. If the questions were for the court and jury, irrespective of the testimony of experts, as to the materiality of the change of place for the stowage, then, as a matter of law, the defendant was entitled to a verdict upon this policy upon the evidence and upon the direction of the judge and the finding of the jury, that the stowage of specie under the ballast and cargo was stowage in an unusual manner and place, and that the fact of such stowage was concealed from the defendant. There was no room or place for holding, either by the court or jury, that such unusual stowage was a fact not material to the risk. Its mato permit a verdict to pass for the plaintiff upon the ground of the immateriality of this fact under the circumstances of this case. The risk was not the risk assumed by the defendant, and the policy never attached. It is sufficient that, the risk resulting in loss was not the same as that assumed by the defendant. The underwriter had the right to elect whether he would assume the actual risk and to fix the premium, but it was also an increased risk. If the facts can be varied upon a retrial, the plaintiff may, upon some ground other than that already considered, recover; but, upon the exceptions taken at the trial, defendant, upon this branch of the case, is entitled to a reversal of the judgment.

These views render it unnecessary to consider many of the exceptions taken by the defendants upon the trial, some of which prosent questions of interest, but as they mostly relate to the shipment of gold, they become unimportant if the gold was not covered by the policy. Among the questions thus eliminated from the case es presented, is the alleged illicit character of the voyage, and its effect upon the contract. Many of the questions of evidence are also unimportant by reason of the effect given by us to the undisputed evidence and the clear change in the risk by the irregular stowage of the gold. Whether the policies were procured by false representations in respect to the character, credit, position and history of the plaintiff, was properly submitted to the jury. The evidence that the policies were issued in reliance upon such representations, was not so clear and conclusive as to authorise a withdrawal of the question from the jury. The testimony of the vice-president of the defendant is explicit that he should have declined the risk upon the gold had he supposed that it was to be stowed under the ballast or the cargo, but when he comes to speak upon the effect and influence of the representations in respect to the plaintiff, he is not as explicit, but says he should have depended a good deal upon the standing of the house offering the risks, and leaves it somewhat in doubt as to the extent his action was influenced, in taking the risks, by the statements made to him in respect to the personal character and standing of the plaintiff. Again, there was evidence touching the actual character, history and standing of the plaintiff, and the truth of the statements made to the defendant, which made it eminently proper that the whole question upon this branch of the defence should be submitted to the jury.

Several exceptions were taken to the exclusion and admission of evidence upon minor points, which, as they may not be repeated upon another trial, we do not deem it important to consider. Exceptions were also taken to several of the refusals of request by the defendant to charge the jury, none of which we deem it important to refer to.

For the errors suggested, and without considering the other questions which will not necessarily arise upon another trial, the judgment must be reversed, and a new trial granted, costs to abide the event.

Supreme Judicial Court of New Hampshire.

CHANDLER & COE.

In accordance with the provisions of the Revised Statutes of the United States, enacted June 22d 1874, and the subsequent Act of Congress of March 3d 1878, a cause will not be removed from a state court to the Circuit Court of the United States, unless the petition for such removal he filed in the state court before or at the term at which said cause could first be tried, and before the first trial thereof.

Such potition will not, therefore, he entertained, when filed in the state court after a verdict in the cause has been rendered, notwithstanding the verdict may have been set aside for error and a new trial ordered.

THE plaintiff was a citizen of New Hampshire. The defendants were citizens of Maine. The defendant, S. R. Bearce, is now dead, and his death has been suggested on the record. The cause was tried by jury at the November Term 1878 of the Supreme Judicial Court, resulting in a verdict for the plaintiff. That verdict was set aside by the whole court at the June Term 1874, and a new trial granted. At the November Term of the Circuit Court 1874, upon petition of the defendant, an order was entered on the decket for the removal of the cause to the federal court, an affidavit and bend being filed in accordance with the Act of Congress of 1867. At the present term the cause stood upon the printed docket, and, although copies in due form had been made out by the clerk at the request of the defendants, to be entered in the United States Circuit Court, the cause had not been actually entered there, the copies had not been taken from the manual custody of the clerk, and no term of said United States Circuit Court had intervened.

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The plaintiff moved that the order of removal, made at the last November Term, he rescinded. This motion was granted by the court, and the defendants excepted. All questions of law and dis-

cretion arising upon the foregoing statement were transferred by LADD, J.

Roy & Dress and Geo. A. Bingham, for the plaintiff.

Fletcher & Heywood and Burns & Heywood, for the defendants.

FOSTER, C. J., C. C. 1—The defendant filed his petition for the removal of this cause into the United States court at the November Term of our Circuit Court 1874. His rights in respect of the removal of the cause, therefore, depend upon the provisions of the Revised Statutes of the United States, enacted June 22d 1874, and the subsequent Act of Congress of March 8d 1875, and not upon the provisions of the Acts of 1866 or 1867, which were repealed by the enactment of the Revised Statutes. The propriety of the rescission by the judge presiding at the April Term 1875, depends upon the settlement of the question whether the defendant was entitled, under the federal statutes, to have the cause removed, after one trial upon its merits, before a second trial, which had been ordered by the full beach for error in the previous trial.

By the terms of the United States Revised Statutes, ch. 7, sec. 689, par. III., the petition for removal must be filed "before the trial or final hearing of the suit."

In Whittier v. The Hartford Fire Ins. Co., 55 N. H. 141, at the last March session of this court, my brother SMITH, the other judges concurring, expressed his interpretation of the language used in the statute as meaning, not before the final trial or final hearing, but before any trial or any final hearing of the suit.

In Insurance Co. v. Dunn, 19 Wall. 214, in constraing the Act of Congress of 1866, in which the words used were the some as those adopted in the revision of 1874—" at any time before the trial or final hearing"—SWATNE, J., said,—" The language above quoted—'at any time before the final hearing or trial of the sait'— of the Act of March 2d 1867, is not of the same import as the language of the Act of July 27th 1866, on the same general subject—'at any time before the trial or final hearing;'" and his deduction is, that under the Act of 1867 a removal might properly be made, after a trial on the merits and a judgment on the verdict, in a state where by local statute the party could still demand, as of right, a second trial, but that doubts, at least, might be enter-

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Act of 1866; and if, as he suggests, the change was deliberately made in 1867 to obviate those doubts and to make the latter act more comprehensive, so it is equally fair to presume that the change in 1874 to the language used in the Act of 1866 was deliberately made, not to revive "doubts that might possibly have arisen" under the Act of 1866, but to make the latter act (of 1874) more restrictive.

Happily, no doubts can remain concerning the present intention of Congress to limit the removal of causes from the state to the federal courts to a period antecedent to the first trial of the suit; for the Act of March 8d 1875, sect. 8, provides that the petition for removal shall be filed in the state court "before or at the term at which said cause could be first tried, and before the trial thereof."

This act was passed some weeks before the judge made the order of rescission in the present case, and this declaration of the law and policy of the federal Congress manifests the predence of the judge's order, so far as the matter rested in his discretion.

In Whittier v. Insurance Co., the petition for removal was made after a trial and judgment, unreversed by the proceedings in review: but the distinction between that case and the present is one without substantial difference, as it seems to me, for in this case, as in that, the defendant, the verdict against him having been set aside, was as much entitled to demand a new trial as in the former case the party was entitled to demand it under the statute granting a right of review. In both cases there was one trial of the cause upon its merits before application for removal, and in neither case was that one trial a final trial. In Whittier v. Insurance Co., the petition for removal was denied.

In Galpin v. Critchlow, 18 Am. Law Reg. (N. S.)187, it was decided that an action cannot be removed from a state court into the Circuit Court of the United States under the Act of Congress of 1867, after a trial on the merits, although such trial has resulted in a disagreement of the jury.

A fortieri, if the reasoning of Judge SWAYNE and my brother SMITE is correct, such cause could not, in the same circumstances, be removed under the Act of 1866.

It will be borne is mind that the terms used in the Act of 1806

are "before the trial or final hearing;" those employed in the Act of 1867 are "before the final hearing or trial."

In Galpin v. Oritchlow, Mr. Chief Justice GRAY does not contend that these terms are not equivalent. They are, in fact, whatever may have been the intention of the legislators, more transpositions in the two several acts. And, regarding the words under consideration as practically synonymous, the learned chief justice infers that the Act of 1866 (and 1867 likewise) "has regard to suits in equity as well as at law;" because it calarges the right of removal under the Act of 1789 (which was "at any time before trial"), by conferring the right in suits brought "for the purpose of restraining or enjoining" the defendant. In the Act of 1866, ch. 288, we find for the first time, if I am not mistaken, the words "or final hearing of the cause" added to the words "at any time before the trial."

"Trial," says Mr. Chief Justice GRAY, "appropriately designates a trial by the jury of an issue which will determine the facts in an action at law; and 'final hearing,' in contradictinction to hearings upon interlocutory matters, and hearing of the cause upon its merits by a judge sitting in equity. The whole effect of the change in the statute in this respect seems to us to have been to allow the defendant the same time to elect whether he will remove the case into the federal court, as he has to prepare for a trial at law, or hearing upon the merits in equity in the state enert; * * but not to allow him, after the experiment of entering upon one such trial or hearing in the court in which the suit is commenced, to transfer the case to another jurisdiction."

The learned chief justice "cannot believe that Congress, by transposing" the words, "intended that a right of removal depending upon a more affidavit of the party to a condition of things which litigants are too often prone to suspect, and conferred by this statute upon a plaintiff who has veluntarily reserved to the state court, as well as a defendant who has been compelled to appear therein to protect his rights, should be exercised after once submitting the case to be decided in the state court upon its morits, and at a later stage than any other suit is authorized to be removed from the state to the federal courts, except by writ of error after judgment."

Judge REDFIELD, in a note appended to this case, as reported in the Law Register, commands the spinion not only for the "ingo-

nious and happy argument" presented therein, but for its "fairness and dignity," calculated, as the conclusion of the court is, " to maintain proper respect for the spirit of the national legislation in general, especially towards the state courts."

In bolding that the ruling of the judge at nici prine, rescinding the order for a removal of this cause before the intervention of a term of the federal court at which it would have been entered, was right in point of law and sound discretion, we do no more than declare, without arrogance or assumption, that, except by writ of error from the Supreme Court of the United States, whose judgment is conclusive upon all the judicial tribunals of the land, the jurisdiction of our own state courts is not to be reduced to "very inferior and insignificant proportions."

If the views which I have expressed are sustained by my brothron, the defendant's exceptions must be overruled.

Comming, C. J., and Smith, J., concurred.

Supreme Court of Ohio.

JONES, STRANATHAN & CO. v. WILLIAM GREAVES.

On the trial of a civil action, wherein the claim or defence is based on an alleged fraud, the issue may be determined in accordance with the prepanderance or weight of evidence, whether the facts constituting the alleged fraud do, or do not, amount to an indictable offence.

Morron for leave to file a petition in error to the District Court of Muskingum county.

The original action was brought by William Greaves against Jones, Stranathan & Co., to recover a balance alleged to be due to the plaintiff for labor and materials in tin-roofing a storehouse of defendants under a special contract. The contract, as the plaintiff claimed, designated the material to be used as "the best quality of roofing-tin;" but the defendants claimed that the contract required "ix charcoal tin" to be used. The latter is the better quality of tin, and worth four dollars per box more than the fermer. The contract was entered into in this way: The defendants proposed for bids in writing, specifying the quality of the material to be furnished for the roof by the bidder; the plaintiff's bid was \$1100, which bid the defendants accepted and promised to pay. Afterward, the plaintiff purchased tin of the quality

known as "the best quality of roofing-tin;" whereupon the defendants objected to the use of this quality of tin, unless the plaintiff would agree to abate from the contract price four deliars per box of tin. The plaintiff agreed to the reduction and used the material so purchased in making the roof. Afterward the plaintiff refused to accept in payment less than the original contract price, on the ground that his agreement to abate the four deliars per box was obtained by the fraudulent acts and representations of the defendants. The fraud practiced by the defendants, as claimed by the plaintiff, was thus: That after the making of the original contract, the defendants fraudulently altered the written proposal for bids, by inserting therein the words "ix charceal tin," and afterwards induced the plaintiff to believe that the specification of materials, at the time plaintiff's bid was made, required the furnishing of the better and higher-priced quality of tin.

This question of fraud was put in issue by the pleadings, and testimony was offered, on the trial, tending to prove the issue on both sides.

The Court of Common Pleas was requested by the defendants to charge the jury that before they could find the defendants guilty of the fraud alleged, they must be satisfied from the evidence, beyond a reasonable doubt, that the fraud had been committed. This request the court refused to give, but did charge that a preponderance of evidence would be sufficient to prove the same. Exceptions were taken. Verdiet and judgment were readered for the plaintiff. On error, the District Court affirmed the judgment below; and the only matters assigned for error here relate to the refusal of the Common Pleas to charge as requested and to the charge as given.

Evans & Board, for the motion.

M. M. Granger (with whom was D. B. Gary), contra.

The opinion of the court was delivered by

McILYAINE, C. J.—There is no doctrine of the law settled more firmly than the rule which authorizes issues of fact in civil cases to be determined in accordance with the preponderance or weight of the evidence. The reason of the rule no doubt is, that as between man and man, where a loss must fall upon one or the other, it is right that the law should cast it upon him who is shown to have

been the cause of the loss, by proof establishing the reasonable probability of the fact.

But in criminal cases, where compensation for the injury done is not an element, the rule may well be, and is, different. In these cases, where the sole object of the prosecution is punishment, a humane principle is introduced, which requires that the guilt of the accused should be proved beyond a reasonable doubt. This principle is often expressed in the maxim, "It is better that ninety and nine guilty persons should go acquit, than that one innocent person should be punished."

It is claimed, however, by the plaintiffs in error (defendants below), that civil actions, wherein fraud amounting to a criminal effence is directly in issue, are excepted from the rule above stated; and that in such cases the rule of the criminal law applies. they further claim, that the facts in issue in the case below, constituting the fraud alleged against them, amounted to the crime of forgery. Whether forgery could have been committed by altering the paper referred to in the pleadings, or whether the alteration alleged to have been made by the defendants below amounted to the crime of forgery, are questions we need not stop to answer, as we are satisfied, in any event, that the issue of fraud, as made in this case, did not take it out of the operation of the general rule applicable to the trial of civil issues. If there be any exception to the rule, of the kind claimed, it is limited to cases where it is necessary, in order to maintain the issue made, to prove that a crime was in fact committed; as, for instance, in justification of a slander imputing a crime.

We have no occasion now to question the existence of such limited exception, but I may be permitted to say that all argument and all authority are not in its favor. It was denied, with great reason, in Munson v. Atwood, 80 Conn. 102, an action under a statute, to recover treble damages for property feloniously taken and carried away.

We are aware that an exception to the rule, broader than we have stated it above, has been recognised in a few insurance cases:

16 Ohio 824; 2 Greenl. Ev., sect. 408. It has been held, however, to the contrary, in other well-considered cases: 1 Gray 529;

1 IA. Ann. 216.

What the rule may be in insurance cases we need not now determine, further than to say that if there be no ground of distinction between them and other civil cases, it is extremely doubtful whether, as to them, there is any exception to the general rule; as it is quite certain that an insurer may successfully defend, in an action on his policy, on the ground of gross or wilful misconduct on the part of the insured, which does not amount to criminal conduct.

We think it is going to the verge of the law, to held that an same of fact, in a civil case, must be proved beyond a reasonable doubt, even where a charge of crime is directly made, and where, also, it is necessary that it be made in order to sustain the claim or the defence; as it is difficult to see how a person, who wrongs another without criminal intent, and is liable in damages on a mere preponderance of the evidence, can shelter himself from liability bekind a reasonable doubt, by merely adding to the wrongful act a criminal purpose. Of course, we are not now speaking of those enormous crimes where all personal injury is merged in the public wrong; nor do we intimate that in all civil actions the issues should be determined by a mere preponderance of the testimony offered on the trial, however slight. Where the facts charged involve moral turpitude, there is a presumption of innecence which stands as evidence in favor of the party charged; and the more beingus the offence, the stronger the presumption. It is only where the testimony, when considered in connection with the presumptions of law arising in the case, preponderates in favor of the charge that its truth should be found; but when so considered, by discreet and reasonable triers, the issue should be determined in accordance with the preponderance, although it may not be said that the proof has removed all reasonable doubts.

The conclusion, therefore, to which we have come, is this: that whatever may be the rule in civil cases, where the claim or defence can be established only by averment and proof that a crime has in fact been committed, in all other civil cases the issue should be determined by the weight or preponderance of the evidence, whether it be or be not sufficient to remove all reasonable doubts.

How, then, stands this case? It was not necessary, in order to maintain the issue on his part, that the plaintiff below should have proved, nor was it necessary for him to ever in his pleadings, that the alteration in the written proposal for bids was a forgery within the meaning of the Crimes Act. Indeed the consequences of the alteration were the same to him and to his case, whether there was

or was not such a crime as forgery known to the criminal law. It was only material for him to show that the altered paper was fraudulently used by the defendants as a means to obtain from him a change in the contract. Whether the alteration had been innocently or feloniously made, was of no direct importance. The material question in issue was this: Did the defendants fraudulently obtain from the plaintiff the modification of the contract as subsequently agreed to by him?

This case comes within the principle decided in the case of Strader v. Mulvane et al., 17 Ohio St. 624. There was no error in the refusal to charge, or the charge as given by the Court of Common Pleas.

Motion overruled.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹
SUPREME COURT OF ILLINOIS.²
SUPREME COURT COMMISSION OF OHIO.³

ADMIRALTY. See Collision.

Cress-libel.—Where, in a suit in admiralty, a cross-libel and answer have been filed and a decree entered dismissing the cross-libel, such a decree, if not appealed from, is conclusive that the libellant in the cross-suit is not entitled to recover affirmative damages for any injuries received by his own vessel, but it does not preclude him from showing in the original suit, if he can, that a collision was the result of inevitable nesident, or that it was occasioned by the negligence of those in charge of the other vessel, or that it was a case of mutual fault, where the damages should be divided: Pitts, Executor, dec., v. River & Lake Shore Steamboat Line, S. C. U. S., Oct. Term 1878.

AGENT.

Notice to, or knowledge by, an agent or a sub-agent is notice to, or knowledge by, the principal, but to make it so the notice or knowledge must come in the course of the principal's business, or from a prior transaction then present to the agent's mind, and which could be properly communicated to the principal: Hooser v. Wise, S. C. U. S., Oct. Term 1875.

But notice or knowledge on the part of an agent of an intermediate employer will not affect the principal: Id.

W., residing in New York and having a claim against a debtor in No-

¹ Prepared expressly for the American Law Register, from the original opinions. The cases will probably be reported in 1 or 2 Otto.

^{*} From Hon. N. L. Freeman, Reporter; to appear in 77 Illinois Reports.

^{*} From E. L. De Witt, Eog., Reporter; to appear in 27 Ohto St. Reports.

branks, put it in the hands of a collection agency, who sent it to at attorney in Nebranks. This attorney, with knowledge of the debter's insolvency, accepted a confession of judgment from him, collected the money and remitted it to the collection agency. The debter being adjudicated a bankrupt within four months, his assignee brought suit against W. to recover back the money. Held (three judges discenting), that the attorney was not the agent of W., and the former's knowledge was not chargeable to the latter: Id.

Whether a different result would have been reached if the money had

been paid over to W., not decided : Id.

BANKERS. See Broker.

BANKRUPTOY.

Effect of an Adjudication of Bankruptcy upon a Suit for the Porcelosure of a Mortgage.—Where a suit to forcelose a mortgage was instituted in a state court, which proceeded to a decree and sale, and the plaintiffs became the purchasers, receiving the master's deed for the premises, which was duly confirmed by the court, and pending these proceedings the mortgager was adjudicated a bankrupt and an assigned appointed, but not made a party to the suit on the mortgage. Molf, that there was no provision in the Bankrupt Act which would affect the title of the purchaser under the decree: Egster v. Geff et al., S. C. U. S., Oct. Term 1875.

The debtor of a bankrupt, or one who contests with him the right to real or personal property, loses none of his rights by the bankruptey of his adversary. The same courts still remain open to him, and in the classes of cases where the Bankrupt Act has conferred a jurisdiction on the federal courts for the benefit of the assignee, it is concurrent with, and does not divest that of the state courts: Id.

BROKER.

Texation of Bankers and Brobers.—Plaintiffs were bankers and paid their tax as such. They also bought and sold gold and stocks for others, and on their own account. The collector of internal revenue assessed an additional tax upon them, as brokers, for all their seles of this kind, as well those on their own account as those for others. Held, that the assessment was proper: Warren v. Shook, S. C. U. S., Oct. Term 1875.

Collision. See Admiralty.

Duty of Vessele under Steam.—Two ships under steam, if they are meeting end on, or nearly end on, so as to involve risk of collision, are required to put their helms to port, so that each may pass on the port side of the other, but if they neglect to comply with that requirement until it is so late that the object to be accomplished causet be effected, it is no defence to allege or prove that one or both ported their helms before the collision occurred, for unless a party seasonably complies with the requirement, the act of compliance is without substantial merit: Perryboat, da., v. Railroad Transportation Co., S. C. U. S., Oct. Term 1875.

Seiling rules were ordained to prevent collisions between ships om-

ployed in navigation, and to preserve life and property embarked in that perileus pursuit, and not to enable those whose duty it is to adopt, if possible, the necessary precautions to avaid such a disaster, to determine how little they can do in that direction without becoming responsible for its consequences in case it occurs: Id.

The rule, that where, both reasels are in fault the damages should be divided between them, sught not to be extended so far as to inflict positive less on innecest parties: Constroise Co. v. De less Cases; Le less Cases v. Bleamer Alabama et al., S. C. U. S., Oct. Torm 1875.

Effect of Maritime Usage.—Usages called sea laws, having the effect of obligatory regulations, to prevent collisions between ships engaged in nevigation, existed long before there was any legislation upon the subject, either in this country or in the country from which our judicial system was largely borrowed: Steemship City of Washington, &c., v.

Baillie et al., 8. C. U. 8., Oct. Torm 1875.

Sailing rules and other regulations have since been suscted, and it is everywhere admitted that such rules and regulations, in cases where they apply, furnish the parameters rule of decision; but it is well known that questions often series in such litigations outside of the scope and operation of the logislative enactments. Safe guides in such cases are often found in the decisions of the courts, or in the views of standard textwriters, but it is competent for the court in such a case to admit evidence of usage, and if it be proved that the matter is regulated by a general usage, such evidence may furnish a safe guide as the proper rule of decision: Id.

Mast-head lights should be displayed by pilot vessels. Lights of the kind are required as one of many precautions which prudent navigators are expected to provide, but it would be unreasonable to hold that the owners of a pilot vessel should be adjudged liable for the consequences of a collinion by reason of not having a mast-head light, where it appeared beyond all doubt that she constantly showed flash-lights, which were seasonably seen by the other vessel, and that the absence of the mast-head light had nothing to do with the collision: Id.

CONSTITUTIONAL LAW.

Power of Congress to protect Constitutional Rights.—Rights and immunities created by or dependent upon the Constitution of the United States, can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected: United States v. Rosse et al., S. C. U. S., Oct. Term 1875.

Ross et al., S. C. U. S., Oct. Term 1875.

If Congress has not declared an act done within a state to be a crime against the United States, the courts have no power to treat it as such:

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The lifternth amendment to the Constitution of the United States has invested the citizens with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise, on account of race, color or previous condition of servicade: Id.

The Act of May 21st 1870, enumerally called the Enforcement Act, is not in pursuance of this amendment, and Congress has not so yet pro-

vided by apprepriate legislation for the punishment of a violation of the provisions of this smeadment. CLIFFORD and HUNT, JJ., dissenting: Jd.

Power of Congress over Right to petition for Redress of Grisonness.—The first amendment of the Constitution prohibits Congress from abridging "the rights of the people to assemble and to petition the government for a redress of grisvances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the state governments in respect to their own citizens, but to operate upon the national government alone: United States v. Cruikshank et al., S. C. U. S., Oct. Term 1875; affirming U. S. v. Cruikshank, 18 Am. Law Reg. N. S. 630.

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against Congressional interference. For their protection in its enjoyment, therefore, the people must look to the states. There is where the power for that purpose was originally placed, and it has never been surrendered to the United States: Id.

It is no more the duty or within the power of the United States to panish for a conspiracy to falsely imprison or murder within a state than it would be to punish for false imprisonment or murder itself. CLEP-PORD, J., dissenting: Id.

Due Process of Low.—A statute of Louisiana prescribed that a commission should be primd facie proof of right to judicial office, and if any incumbent refused to vacate and turn over the office to the person bearing such commission, he should be cited by rule returnable within twenty-four hours to present his claim for adjudication before a court, which should hear the case without a jury, and its determination should be final unless appealed from within one day. The appeal if taken was to be returnable to the Supreme Court within two days, and to have precedence over all other business. Held, that a competent tribunal and mode of proceeding were provided, which, though speedy, were "due process of law:" Kennard v. State of Louisiana, S. C. U. S., Oct. Term 1875.

Interference with Vesteri Estates—Changing Fos-tail to Fos-simple by Statute.—In the Act of Documber 17th 1811, "to restrict the entailment of estates" (5. & C. 550), the clause which provides "that all estates given in tail shall be and remain an absolute estate in fos-simple to the fewer of the first dense in tail," was intended to limit entailments then subsisting, as well as those which might be thereafter created, and the exactment, thus construed, was not a projudicial interference with vested rights, nor beyond legitimate legislative power: Police's et al. v. Speidal, 27 Ohio St.

Therefore, where an estate in tail was created by dood, in 1867, and the issue of the first dence in tail sold and coursed the premises in feasimple, in 1836, by deed with covenants of general warranty, both he and his heirs were thereby for ever estepped to claim title to the premises against the grantes of such issue or his assigns: Id.

Multiplicity of Buits—Jurisdiction of Indonal Courts to enfoia Proceedings in State Courts.—Colin Groves, of Medices, La., by her will

divised a plantation to plaintiffs, and appointed Carpenter her executer and general devises. Phintiffs filed a bill within a few months after death of testatriz, against Carponter, alleging incompetency and waste of the catate, and also against one Dennis, who had sued Carpenter in the state court, claiming to have been a partner of testatrix; against one Stout and others who claimed to be testatrix's heirs and had sued in the state court to set aside the devise to plaintiffs as void; and against Groves and others, heirs of testatrix's former husband, who had sued in the state court, claiming that the property never belonged to testatrix, but to her husband. Held, that the bill was bad on demurrer, first, because there was no such multiplicity of suits as would justify the interference of chancery, the suits recited being by separate parties and for separate and distinct causes of action; and second, because the principal relief sought was an injunction against proceedings in a state court, a thing the federal courts are expressly forbidden to do: Haines et al., Trustees of Vicksburg Baptist Church, v. Curpenter et al., B. C. U. S., Oct. Term 1875.

CONTRACT.

Construction of Contract—Conditional Subscription to Stock.—The Odorless Rubber Co. being emberrassed, passed a resolution that whereas its stock was impaired to the extent of 80 per cent., therefore, that stock to the amount of \$72,000 (being 80 per cent. of the capital) should be called in and cancelled, and new subscription obtained for new stock. After the passage of this resolution, defendant signed a subscription paper for new stock, which after setting forth the number of shares subscribed for, terms of payment, &c., contained this provision, "it being understood that none of said subscriptions shall be obligatory until at least the amount of \$118,000 of stock shell have been subscribed, and that 30 per cout. deduction is made on the old stock of this company, as per vote of stockholders June 10th 1872." Held, that the reduction of 30 per cout. was a condition of the subscription and not a mere repre, sentation of a state of facts supposed to exist at the time: Baker et al. Assigness of Odorless Rubber Co., v. White, S. C. U. S., Oct. Term 1875.

CORPORATION. See Contract; Stock.

Liability of Stockholder to Assessments.—The transferee of stock on which only a part of its nominal value has been paid, is liable to calls for the unpaid portion mode during his ownership without any proof of an express promise by him to pay: Webster v. Upton, Assignee, S. C. U. S., Oct. Term 1875.

And although his certificate insued by the company was marked "non-assessable," this is no defence to an action by an assignce of the company after it has become insolvent. As against creditors, the company has no power to release or contract against the payment of such calls: Id.

Estepped to deny Corporate Existence.—A stockholder of a banking corporation which is a corporation de facto, who participates in its transactions and receives dividends, will, by such acts, be estopped to insist when such by its creditors that the corporation was not legal. Whether the bank has been regularly organized or not, is not a defence that can be availed of by a stockholder as against a bond fide creditor, if it appears there was a corporation de facto: Wheeleck v. Kost, 77 III.

Dealing with Directors.—A director or stockholder of a private corporation may trade with, borrow from or lend money to the company of which he is a member, on the same terms and in like manner as other persons; but where a director lends money to his corporation taking a deed of trust to secure the same, he must not fairly, and be free from all fraud and oppression; and where that is the ease, the security may be enforced the same as if given in favor of any other person : Herte v. Brown, 77 III.

COVENANT. See Constitutional Law.

Performance—Time.—Where a builder has done a large and valuable part of the work, but yet has failed to complete the whole or any specific part of the building or structure within the time limited by his covenaut, the other party has the option when that time arrives of aboudoning the contract for such failure, or of permitting the perty in default to go on, and if he does the latter, either expressly or by standing by while the other goes on, he cannot afterwards set up the breach as a defence to an action for the contract price: Construction Co. v. Egmour et al., S. C. U. S., Oct. Term 1875.

For the injury done by the failure to perform in the stipulated time, he may recover in a suit on the contract, or he may recoup, in an action

on the contract against him, for the price: Id.

In an action of covenant founded solely on a specialty, evidence of a perol promise is inadmissible: Id.

DAMAGES. Soe Waters, &c.

Exemplary—Gross Negligence—Railroad.—It is settled that these may be exemplary or punitive damages in tort, but ealy where the injury in the result of wilful misconduct, or that entire want of care which would raise a presumption of conscious indifference to consequences; Milwaukes & St. Paul Railroad Co. v. Arme, S. C. U. S., Oct. Term 1875.

The more fact of a collision between two railread trains, not movin with extraordinary speed and not producing a general destruction of either train, while it is evidence of negligence for the recovery of compossestory demages by a person injured, will not support a verdist for exemplary damages: Id.

EQUITY.

Practice under Codo—Right to Jury.—In a civil action, where the facts stated in the petition, and the nature of the relief primarily demanded, are within the sole jurisdiction of a court of equity, neither perty onn, of right, demand that the issue of fact made by the pleadings touching the plaintiff's right to such relief, shall be tried by a jury; and, therefore, after finel judgment, adverse to the plaintiff, in the Court of Common Pleas, he may appeal such a case to the District Court: Accoland v. Entrekin et al., 27 Uhio 81.

And this right of appeal is not affected by the fact that the plain also demands a money judgment, by way of damages to which he is not affected by the fact that the plain incidentally be entitled, as a result of his obtaining the equitable re-

sought: Id.

Aiding a Franci.--Plaintiff having a balance of \$19,000 in book on

the day before property was to be listed for state taxation, drew it out in United States notes, placed them in a package and deposited them in the vent of the bank. A few days after the listing, he took out the package and redeposited the notes to his credit. In his return of tax-sble property he made no mention of these notes, but the assessors added the amount of them to his return, whereupon he filed a bill to restrain the collection of the tax on this amount, on the ground that being in United States notes it was not taxable for state purposes. The Supreme Court of Kansas dismissed the bill on the ground that the plaintiff's action was a fraud on the state which a court of equity would not assist. (See the opinion in full, 11 Am. Law Reg. N. S. 626.) Held, that the decision was correct: Mitchell v. Commissioners of Louvenwoorth, S. C. U. S., Oct. Term 1875.

ERROR. See Practice; Writ of Error.

· Practice—Allowing Bill of Ecceptions after Term.—A case was submitted to the court without a jury, and the judge made a general finding for the plaintiff; a motion by defendant for a new trial was continued till the next term, when it was overruled and judgment entered for plaintiff. A writ of error was then taken out, and at the next term a bill of exceptions was scaled for defendant without any extension of time being asked or allowed, and without any consent being asked or given by plaintiff; the bill, however, was regular in form and showed that the exseptions were taken at the trial. Iteld, that the bill was a nullity. In United States v. Breitling, 20 How. 258, a bill was scaled after the term. but under circumstances from which consent of the opposing counsel might be presumed. Under ordinary circumstances the power of a judge to seal or allow a bill of exceptions ends with the term at which the trial is had, unless there is an express order of the court extending the time or the opposite party consents: Muller et al. v. Ehlers, B. C. U. S., Oct. Term 1875.

Practice—Final Judgment.—An order of the circuit court reversing a judgment of the district court, where the case shows that the order if formally and fully drawn up would only be to set aside a verdict and judgment, and award a new trial for misdirection on the law, is not a faal judgment on which a writ of error will lie: Baber et al. v. White, S. C. U. S., Oct. Term 1875.

Practice—I'more of reviewing Court over the Record—New Trial.— A reviewing court on error has no control of the records of the court below, and cannot, therefore, make any correction or change therein, but such corrections or changes must be sought in the court where the record is made: Smith et al. v. Board of Education, 27 Uhio St.

A reviewing court may, however, disregard any matter purporting to be part of the record, which is not legitimately and properly matter of record : Id.

What shall constitute the record of a case, is regulated by statute, and any paper the statute authorises to become part of the record may be made part thereof, without an express order of the court to that effect: Id.

When a motion for a new trial is granted by the court in which it is made, the judgment rendered on the new trial will not be reversed for

ESTATE TAIL. See Constitutional Law.

EVIDENCE. See Mulicious Prosecution.

Porol Textmony to Reform written Instrument—Mistake.—Clear and convincing proof is required to warrant the reformation of a written instrument on the ground of mistake, and when it clearly appears that this rule has been disregarded in reforming an instrument, and the finding of the court can be anatained only upon the supposition that it regarded the law as requiring nothing more than a mere proponderance of evidence to warrant a finding austaining the alleged mistake, a reviewing court, on error, may reverse the judgment based on such finding: Potter v. Potter's Executric, 27 Ohio St.

Order of Receiving.—Where evidence was effered by the plaintiffs, tending to show statements and admissions, purporting to have been made by A. in relation to the employment of the plaintiffs by the defendants, as architects, it was competent for the court to admit such evidence, subject to the condition that the plaintiffs should subsequently prove that A., who made the declarations, was the agent of the defendants: The First Unitarian Society v. Faulkner et al., S. C. U. S., Oct. Term 1875.

Where no such evidence was afterwards introduced by the plaintiffs, but the bill of exceptions of the defendants showed that the attention of the court was not again called to the subject, it was not competent for the defendants to remain silent and suffer an error to be committed by the court, in order that they might have a valid exception, if the verdict was in favor of the plaintiffs: Id.

INSURANCE.

Compliance with condition of Policy.—The insured had bought the goods insured of one F. They were left in the store of H. & Co., auctioneers, at the time of the purchase, and were left there for sale by and under the direction of V., the purchaser. It was agreed by him that the first proceeds of the sale should be paid to the vendor, to the amount of \$3150, and if the auctioneers advanced money upon the stock they were authorized to retain the possession and control of the goods as their security. There was no evidence, however, or claim that any such advance was made. In a suit on the policy, defence was made on the ground of a violation of that condition of the policy which provides, that " if the interest of the assured in the property is not absolute, if must be so expressed in the policy, otherwise the insurance shall be void," and of a mis-statement in answering that there was no encumbrance on the property insured. Rell, that the interest of the insured was absolute, and that he was entitled to recover ! Fire Inc. Oo. v. Vanghan, S. C. U. S , Oct. Term 1875.

Oper-valuation.—An ever-valuation of property by the insured, with a view and purpose of obtaining insurance thereen for a greater sum than could otherwise be obtained, is a fraud upon the insurance company that avoids the policy: Id.

It is a question, however, of good faith and honest intention on the part of the insured, and though he may have put a value on his property greatly in execus of its each value in the market, yet if he did so in the

honest belief that the property was worth the valuation put upon it, and the excessive valuation was made in good faith, and not intended to mislead or defraud the insurance company, then such over-valuation is not a fraudulent over-valuation that will defeat a recovery: Id.

INTERNAL REVENUE. See Broker.

JURISDICTION. See Bankruptcy; Constitutional Law.

Supreme Court of the United States.—Where the question before the Supreme Court of the United States in the effect, under the general public law, of a state of sectional civil war upon a contract of life insurance, the court has no jurisdiction, as no federal question is presented for determination: The New York Life Ins. Co. v. Hendren, S. C. U. S., Oct. Term 1878.

LANDLORD AND TENANT.

Landlerd's Lien.—A purchaser of grain raised by a tenant, upon which the landlord has a lien for rent, with knowledge of that fact and that the rent is not fully paid, will be liable to the landlord for the rent due, to the extent of the value of the grain purchased by him: Prettymen v. Unland, 77 III.

MALICIOUS PROSECUTION.

Evidence—Change of Low—Retroactive Statute.—In an action for malicious prosecution founded on a criminal proceeding before a magistrate, and when the issue involves malice and probable cause, it must be tried by direct and competent evidence to the jury. And it is error on such issue to permit witnesses to rehearse the testimony given before the magistrate by witnesses other than the defendants: John v. Bridgman and Wife, 27 Ohio St.

But it is competent to prove by any competent witness who was present, and heard the testimony, that no evidence in support of the criminal charge was effered or given by the defendant. Richards v. Foulke, 3 Ohio 52, distinguished and followed: Id.

In such trial the record of the magistrate is competent evidence, at least to show the facts of the acquittal and discharge of the plaintiffs: Id.

When at the time the action was brought, a witness would have been incompetent, but an amondatory law in force at the time of the trial makes him competent, the law in force at the time of the trial governs the question. The unpublished case, 25 Ohio St. 500, decides this. Nor in such law as applied liable to the objection of being retreastive within the prehibition of the Constitution of 1851: Id.

MANDAMUS. See Municipal Bonds.

MARRIED WOMAN.

Separate Estate—Land bought and improved by Wife with Money sequired before Marriage and with separate Earnings—Acquisecence of Hashand.—A., a married woman, purchased land with money which had been given to her previously to her marriage by her father. The buildings created thereon were constructed partly with such money and partly with her subsequent earnings. At the time of her marriage, the

common law governed in the District of Columbia, where she lived, as to the rights of married women to the personal property possessed by them previously to their marriage, and as to their subsequent carnings. By that law the money which the wife then pussessed and her subsequent carnings helonged exclusively to her husband. A.'s husband having acquiesced for fifteen years in her holding the land is her own name and in making improvements thereon with her carnings: Beld, that in a controversy between the parties after a divorce, this was evidence of his original authorization of the investments, constituting a voluntary actilement upon his wife, and that therefore the property belonged to A.:

Jackson v. Jackson, S. C. U. S., Oct. Term 1875.

MASTER AND BERVANT.

Negligence—Linbility of Master for.—Where a brakeman of a railway company is injured while in the service of the company, in consequence of a defective ladder, which giving way, caused him to fall, the company will not be liable to such servant, unless it had notice of the defect, or might have had such knowledge by the exercise of a proper degree of diligence and care: Tolodo, Wabash & Western Railway Os. v. Ingraham, 77 Ill.

MISTAKE. See Evidence.

MORTUAGE. See Bankruptey.

MUNICIPAL BONDS.

Regularity of Proceedings cannot be inquired into against a bend fide holder—Mandamus.—Where specific power is given by the legislature authorizing a board of education to issue negatiable boads for school purposes upon certain conditions prescribed, the regularity of the proceedings of the board cannot be disputed, where the boads, upon their face, purport to have been issued under the law in question, and where they have been sold by the board and afterward pessed into the hands of a boad fide holder: The State ex rel. Robertson v. Board of Education, 27 Ohio St.

Mandamus is the proper remedy to compel the board to appropriate moneys already in their treasury for that purpose, towards the payment of such bonds, and to levy such tax as may be necessary to complete such payment: Id.

MUNICIPAL CORPORATION.

Municipal Subscriptions and Bonds.—If the people of a county veto a subscription in aid of a railway company to be paid in bonds of the county upon certain conditions precedent, the county authorities cannot delegate power to others to determine when the conditions are performed, but must determine that fact themselves, as the extherised agents of the people. This is an efficial trust, which cannot be delegated: Supervisors of Jackson County v. Bruch, 77 III.

Liesnes of Validice.—A provision in a city charter gave the power "to license, tax and regulate and control vagous and other vehicles conveying loads in the city; to prescribe the width and tire of the same, the weight of loads to be carried and the rates of carriages." Held, not to apply to the case of wagnes used by the defendant in the regular course of his business as a moreheat, but only extends to wagnes of common carriers for hire: Jones v. Bast Nr. Invol. 77 TH

NATIONAL BANKS.

Who liable as Stockholders.—Primarily, a creditor of a national bank may proceed against the party in whom the legal title to the stock is vosted. Where shares of stock in a banking corporation have been hypothecated, and placed in the hands of the transferee, he will be subjected to all the liabilities of ordinary owners, for the reason that the property is in his name, and the legal ownership appears to be in him: Wheelock v. Kost, 77 III.

NEGLIGENCE. See Master and Bervant. Notice. See Agent. Oppices.

Payment for Services.—A person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of those duties, even though subsequently imposed by statute or ordinance. And a promise to pay an officer an extra sum beyond that fixed by hw, is not binding, though he renders services and exercises a degree of diligence greater than could legally have been required of him: 'City of Decatur v. Vermillion, 77 III.

PRACTICE. See Error.

Assignments of Error.—The object of the rule requiring an assignment of errors is to enable the court and opposing counsel to see on what points a reversal of judgment is to be asked, and to limit the discussion to such points. The practice of unlimited assignments covering the whole case and compelling the court to sift out for itself the points really relied on, is a perversion of the rule, and the court will only notice such as seem to it material: Phillips Construction Co. v. Seymour et al., S. C. U. S., Oct. Term 1875.

Public Usb.

Dedication to.—Where the plat of a village showed a square, not divided into lots as the other blocks, with no designation of its use, and the proof showed the sale of lots around the same at an enhanced price, and an intention to dedicate the square to public use, and a long sequice-course in the use of the same as a public park, this was held, to be a dedication at common law to the public use: Village of Princeville v. Auten, 77 Ill.

RECORD. See Error.

BALL

When Delivery to pass Title.—To affect subsequent purchases without notice, and creditors, there must be an actual delivery of personal property, to consummate a sale; but the rule has its exceptions, in the case of warehouse receipts: as where a warehouseman purchased grain stored by him, for another person, and with such other person's money, and took up his outstanding receipt, held by the vendor, and insued a new receipt to the person for whom he bought, it was held that the prain was ant liable thereafter to be taken in execution against the warehouseman: Broadwall v. However!, 77 Ills.

527-077.

When ellowed—Debte evering by and to an insolvent Corporation.—
The debts which may be set-off against each other most be in the same

right, and this rule is the same at law and in equity: Seammon v. Kimbell, Assignes of Matual Security Insurance Co., S. C. U. S., Oct. Term 1875.

Where an insurance company which has beenue insolvent has money on deposit with a banker, the latter may set-off against the company's assigned in bankruptcy, his claims under policies of the company for

leases on properties destroyed by fire: Id.

But he cannot set-off his claims under such policies against his notes for subscriptions to stock of the company. The stock and money due from its sale constitute assets in trust for payment of the company's debts, and the rights of creditors are superior to those of a stockholder, although the latter be also a creditor: Id.

In the ordinary course of business, funds deposited with a banker become his property and constitute an ordinary debt payable on demand in instalments at the depositor's option, and the subject of set-off, but semble if they were deposited with him as tressurer of a corporation the funds would be held upon a trust and not subject to set-off: Id.

SHERIFF'S SALE.

Grounds for acting uside.—Where a plaintiff in execution, through his atturneys, bids in a tract of land turned out by the defendant in the execution, in satisfaction of the execution, in consequence of the misrepresentations of the sheriff making the lovy and sale, that the same was not encumbered, when, in fact, it was encumbered in execus of its value, this will afford no ground for setting saids the sale and satisfaction, as the sheriff is not the agent of the defendant: Vanscoyee v. Kimler, 77 Ill.

STOCK. See Contract; Corporations.

Unpaid—Liability of Owner.—Unpaid stock is as much a part of the assets of an incurance company as the each which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation: Sunger v. Upton, Assignee, &c.; Upton, Assignee v. Tribileock, S. C. U. S., Oct. Term 1875.

A fraudulent representation by an agent of the corporation at the time he obtained a subscription to the stock, that only 20 per cent. of the per value was assessable, is no defence to an action by the corporation or its assignee in bankruptcy for the unpaid instalments. A party has no right to rely on a representation that is contrary to low: Id.

TRUSTES.

Compensation of.—At common law, in the absence of contract, a trustee is outified to no compensation for the management of the trust property. He may impose terms as the condition of his acceptance of the trust, and the person creating the trust may accede to the same or not as he chooses. Where the trust is accepted without agreement as to componenties, the trustee may charge for all reasonable and proper expenses incurred in earing for and preserving the trust property or final: Hoggine v. Bider, 77 IIIs.

WAR

Effect of Immorable Discharge—Meaning of "Allowances."—An honorable discharge of a soldier from service does not restore to him pay and allowances forfeited for descrition: United States v. Landers, S. C. U. S., Oct. Term 1875.

Under the term "allowances" bounty is included: Id.

Effect of a state of War upon Commercial Intercourse.—As a general rule one of the immediate consequences of a declaration of war and the effect of a state of war, even when not declared, is that all commercial intercourse and dealing between the subjects or adherents of the contending powers is unlawful, and is interdicted. In the United States, however, licences to carry on trade, especially in the case of a civil war which is sectional, may be issued under the authority of an Act of Congress, and in special cases for purposes immediately connected with the presecution of the war, they may be granted by the authority of the President, as commander-in-chief of the military and naval forces of the United States: Matthews v. McStea, S. C. U. S., Oct. Term 1875.

Both the Act of Congress of July 13th 1861, and the procismation of the President of August 16th 1861, exhibit a clear implication that before the first was enacted, and the second was issued, commercial inter-

course was not unlawful, and that is had been permitted: Id.

Where a bill of exchange, dated April 23d 1861, and made payable in one year, was drawn on a firm in New Orleans and accepted by them on the day of its date, and A., one of the defendants, and a member of the firm, was a resident of the State of New York, it was held, that the partnership was not dissolved by the war of the rebellion prior to April 23d 1861, and that therefore A. was liable: Id.

WARRANTY. See Constitutional Law.

WATERS AND WATER-COURSES.

Municipal Obsporation—Damages.—If a city in fixing the grade of a street, or in afterwards changing it, causes water to flow upon a lot that it did not naturally flow upon, the city will be held liable therefor: City of Bloomington v. Brokuw, 77 Ills.

WRIT OF ERROR.

From the Supreme Court of the United States to a State Court—To what Court directed—Transmission of Record.—If the highest court of a state has, after judgment, sent its record and judgment in accordance with the law of the state to an inferior court for safe keeping, and no longer has them in its own possession, the Supreme Court of the United States may send its writ either to the highest court or to the inferior court. If the highest court can and will, in obedience to the requirement of the writ, pressure a return of the record and judgment from the testicier court, and send them up, no writ need go to the inferior court. But if it fails to do this, the Supreme Court of the United States may send direct to the court having the record in its custody and under its central: Atherton et al. v. Fourier et al., S. C. U. S., Oct. Term 1875.

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MICROSCOPICAL EXAMINATION OF BLOOD IN ITS RELATION TO CRIMINAL TRIALS.

CAN the red blood corpuscles of other animals be distinguished from those of man, so as to warrant a certain conclusion in those criminal cases in which the question becomes of value in deciding the guilt or innocence of the accused?

It has hitherto been a disputed point, whether human blood could be distinguished from other mammalian blood by any means whatever. The object of this article is to show that this may be determined by measurement, based upon the observation that the corpuscles of human blood, in the aggregate, are larger than those of any other mammal.

Blood itself can be told from other substances by other methods, which serve as a resource in those cases where the corpuscular forms have been destroyed; but by this means alone can the different kinds of blood be recognised.

Dr. Joseph G. Richardson, in his work on Medical Microscopy, quotes the following case, showing the value of microscopic examination, not only in the detection of blood stains, but of other suspected matters, which may chance to have a bearing upon the detection of crime:—

"The trial occurred at Norwich, England, about the year 1850, under the following circumstances: A female child, nine years of age, was found lying on the ground in a small plantation, quite dead from a wound in the threat. Suspicion fell upon the mother

of the girl, who, upon being taken into custody, behaved with the utmost coolness and admitted having taken her child to the plantation where the body was found, whence the child was lost while going in quest of flowers. There was found in the woman's possession a large knife, which was submitted to a careful examination; nothing was found upon it, however, with the exception of a few pieces of hair adhering to the handle, so small as to be scarcely visible. The examination being conducted in the presence of the prisoner, and the officer remarking: 'Here is a bit of far or hair on the handle of your knife,' the woman replied 'Yes, I dare say there is, and very likely some stains of blood, for as I came home I found a rabbit caught in a snare and cut his throat with the knife.'

"The knife was sent to London, and with the particles of hair submitted to a microscopic examination. No trace of blood could at first be detected upon the weapon, which appeared to have been washed; but upon separating the horn handle from the shaft, it was found that a fluid had penetrated into the socket which was found to be blood, certainly not the blood of a rabbit, but bearing a resemblance to that of a human body.

"The hair was then submitted to examination. This hair was found by the microscopist to be that of a squirrel. New round the neck of the child at the time of the murder there was a tippet of squirrel's fur. This strong circumstantial evidence was deemed by the jury sufficient to convict the prisoner, and while waiting execution she confessed her crime."

Had the woman not convicted herself, in her statement to the efficer, and the blood on the shaft of the knife been the only evidence of guilt, perhaps this would not have warranted a conviction, even if it could have been shown to be human blood, as it might have been of old date and the result of accident; but had human blood been found upon the blood, which could not have been fully accounted for in some other way, it would seem to be pretty conclusive evidence.

It will be remembered, in the recent case of Rubenstein, in New York, the defence claimed that the blood found on the prisoner's clothes was hen's blood. This blood is easy to be distinguished from human blood by the form of the corpuscles, but as Prof. Esten; who testified in the case, did not claim to be able to distinguish the blood actually found from some other kinds of mammalian blood

(of the dog, for illustration), had the criminal been wise enough, he might have been able to cheat the gallows, perhaps, without having recourse, as he did, to suicide for that purpose.

But can human blood under any circumstances be clearly distinguished from that of other mammals which resemble it in form—the blood of the dog, for instance?

Dr. Richardson claims that it can be certainly known from that

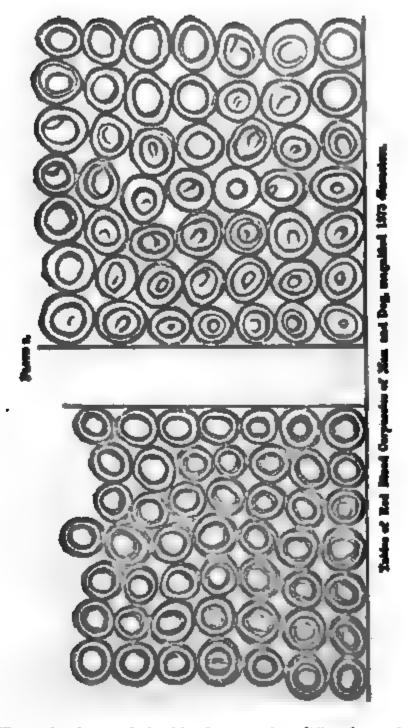
of the ox, sheep or pig, but does not speak of the dog.

In a recent work by M. Naquet, "Professor to the Faculty of Medicine of Paris," entitled "Legal Chemistry a Guide to the Detection of Poisons, Examination of Stains," &c., the following statement occurs: "When they" (the blood-stains) "are telerably resent they may be detected by examining the moistened stained cloth directly under the microscope; a discrimination between animal and numer blood is then possible."

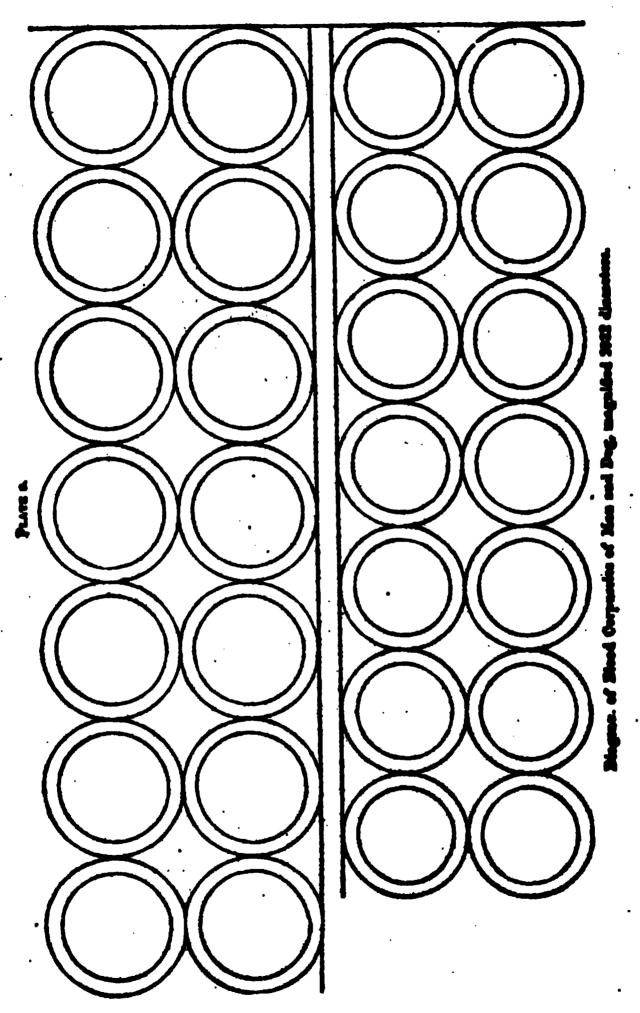
In regard to the recognition of blood stains of long standing, "M. M. Briand Choude Claubry" (Manuel complet de Médecine Légale, Paris, 1852, page 789), declares that "houverer great may be the age of the spots, microscopical examination will nevertheless reveal the blood globules; those on which M. Robin made his experiments dated back from eight to twelve years."

On the other hand, Dr. Woodward, of Washington, D. C., in commenting upon Dr. Richardson's paper, "upon the possibility of distinguishing the blood of man from that of the ex," &c., in a communication published in the "London Microscopical Journal," of February 1875, says, "there are certain mammals, among them the dog, whose red blood corpuscles are so nearly identical in size with those of human blood that they cannot be distinguished by any power of the microscope, even in fresh blood, much less in dried stains."

Having been myself engaged for some time past, in microscopic and chemical investigations, several of which have brought me as a witness in cases before the courts, and also for a number of menths having made the distinguishing between human and other memmalian blood, as well as that of other red-blooded animals, both fresh and in dried stains upon various materials, a careful study, I propose to give the results of these investigations in a journal of the legal profession, to which profession they seem practically to belong, and leave it to them and the scientific world



Where the forms of the blood corpuscies differ from those of man, as would have been the fact in Rubenstein's case, had the bleed found on his garments been, as he alleged, hen's bleed, the question would present no other difficulty than the actual recognition and showing of the forms of the corpuscies, without regard to their size; but in those cases which depend upon differences of



measurement alone, as between man and the dog, a correct condusion rests upon the solution of the question, whether we can by any known means assertain such difference. I may say in this place that I have made all my measurements with one of Hartnack's No. 8 objectives, without collar adjustment. The camera Lucida was placed in every case at the same height from the table (ten inches); the light was size placed at the same angle and distance from the reflector, so that if there was any source of error in any direction it could not have affected the comparative measurement of the corpuscles in the least degree.

The blood, which was obtained from some fifteen individuals of both sexes, from children to adults, and from nearly as many dogs, comprising a spaniel, a Newfoundland, two or three terriers of different ages, besides several mongrels of various breeds, was dried upon glass in the usual manner, and then drawn and measured as shown in my figures.

There is no appreciable difference in measurement between fresh corpuscies and those dried in thin layers on glass. I have chosen those dried on the glass as being the most convenient to draw from.

Instead of measuring separate corpuscies, as they pass under the micrometer, I have adopted a method which seems not only free from error, but which in criminal trials enables me to show the court and jury the result of my investigations, instead of their having, as heretefore, to depend upon the mere abstract statement of numbers.

In every case the miscroscope might be taken into court to verify the accuracy of the drawings, as I have already done in private before several eminent judges and lawyers of this city, in a case of blood corpuscles scraped from the blade of a knife, and restored and preserved on a glass slide.

On making the drawing, in the first place a horizontal line is drawn along the margin of a piece of thick paper—to this a perpendicular line is let fall, forming with the base line the two sides of a rectangular figure. A spot is next selected on the glass slide where the corpuscies are apread in a single layer and are as little deformed as may be, and where one of the squares may be filled without the necessity of much change of place of slide or paper. I next preced to pile up the corpuscies, so to speak, beginning in the angle formed by the meeting of the lines, until I have a pile of seven, and so preced with pile after pile until I have seven piles, containing forty-nine corpuscies in all; this is shown in the first plate. The glass slide is not moved, the paper being moved only

at right angles to bring the corpuscles into lines. I have drawn some eight or ten thousand blood corpuscles of all kinds, and placed in twenty-four tables 1176 human and dog corpuscles, giving 1176 measurements of each.

The magnifying power used gives 1275 diameters; that is, a superficial area of 1626625.

Each of the plates are dated when drawn (as, per example, the one engraved) and marked on the back as follows:—

Plate I. "Blood of female forty years old. Corpuscies takon without selecting, as they occur on the slide, 1275 diameters, June 1st 1876.

"Blood of dog terrier, three years old, taken as above."

The plate shows the relative size of the corpuscies, that of the dog being the smallest.

The average measurement of blood corpuscies from my tables is:

Human blood, Trist of an inch, 0077.74 millimeters.

Dog's " gritt " 0066.89 "

Gulliver, the authority followed by Drs. Carpenter, Flint, Richardson and others, gives:—

Human blood, True of an inch, 0079.40 millimeters. Dog's " True " 0071.60 "

Behmidt, another authority, gives :---

Human blood, 35's, of an inch, 0077.76 millimeters. Dog's " grits " " 0071.60 "

In the engraved plate, No. 1, the human blood was from a female of the age of forty, and the dog's blood was that of a terrier three years old, as before mentioned.

The measurement of the seven rows of human blood corpuseles measured both ways—that is, herisontally and perpendicularly, making fourteen measurements—gives an aggregate of \$7.5 inches, which is below the average, this being \$8.4 inches. The dog's blood measures \$4.7 mehes, which is above the average, this being \$8.9 inches.

I may remark that these drawings were made by me, mathematically accurate on the engraved block; should the print show any difference it will be due to the swelling or shrinking of the paper, and of course this could not affect the proportions.

Divide 87.5 inches by 96, double the number of corpuscies in

the table; this gives .8826, the diameter of one. Divide this sum by the magnifying power 1275 gives 32'53 of an inch = .007614 millimeters. The dog's blood in the plate measured in the same manner gives whole measurement 84.7 inches. One corpuscie, .8551 34'50 of an inch = .007680 millimeters.

I find thus far from all the measurements I have made that if we compare the smallest table of human blood with the largest of the dog's blood, the difference is recognisable at a glance; and if we further, as recommended by Dr. Richardson, use a higher magnifying power, this difference will be still more marked. I give two diagram tables of this kind, showing a magnifying power of 2982 diameters. (Plate II.)

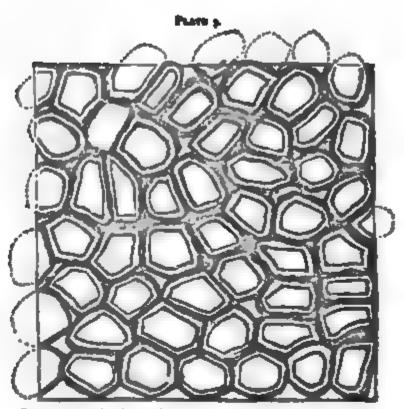
It will be seen how closely my measurements agree with the authorities, and I may say in passing that I had drawn and measured nearly all these tables provious to comparing any of them with these authorities.

In still further pursuing the subject, I propose to give drawings of different forms of blood corpuscles liable to be called in question in criminal trials; and also the result of experiments with reference to distinguishing different kinds of blood taken from spots on various substances; as, per example, from knife-blades, knife-handles, linen, silk, leather, wood, &c., &c., and also to show how far it is possible to distinguish blood spots from other stains, even where the blood corpuscles have been entirely destroyed.

It will be seen at once that by this method of presenting the matter, evidence can be brought in such a manner before those whose province it is to decide, as to preclude the possibility of error on their part.

It will also be seen that, although my measurements de correspond closely with the authorities, thus going to prove their general accuracy; still, were not this the fact, it would not affect the result, as this depends upon the comparison of the corpuscles with each other, without regard to their absolute measurement.

The blood slides were all prepared in precisely the same manner; the corpuseles were figured under precisely the same conditions of the instrument, light, &c. As I have mentioned before, I have made nearly ten thousand drawings of blood corpuseles since I began this investigation. These have been made from fourteen different kinds of animals, and certainly the blood corpus



Blood Corporate drawn threat from paters, as som an glass stile.

cles of no one of these approach as near to those of men as do those of the dog.

I here rest the question "whether the red blood corpusales of man and the dog in their normal condition can by the aid of the microscope be distinguished from each other?" How far this can be done with blood spots scattered on various substances, as mantioned before, remains for future discussion.

The third plate has been drawn since the above was written. It was thought well to give it, as it shows the form the blood corpurcles frequently assume when dried on gians and like substances. The square covers an area about equal to the average of my measurements. If we count two of the corpusties which project over
the lines as accupying the space of one on the inside of the equate,
we shall find that they number forty-nine, as when formed of slagie corpuscion arranged in order, as in my tables; this that shows
that but little, if any, shrinkage occurs, even when the corporation
are forced out of shape from any came.

R. U. Paren, M. D.

RECENT AMERICAN DECISIONS.

Supreme Court of Vermont.

JAMES FERRITER BY AL. O. J. M. TYLER BY AL.

' It is the right of the directors of the public schools to prescribe the hours of attendance of the pupils, and to make a proper system of pupilshments for absence, &c.

In doing this the public rights and convenience must govern, without regard to the wishes or convenience or private preferences of parents or others.

This rule applies to the attendance of the children on public or private religious worship on week-days during the prescribed hours for school. Such purpose deep not excuse violation of the rules of the schools,

In equity on bill and answer. The complainants were members of the Catholic Church in the village of Brattleborough, and it appeared that on June 4th 1875, the priest of the said church, acting in behalf of the complainants, sent to the respondents, who were the prudential committee of that school district, a request that the Catholic children might be excused from attendance at school on all holy days." and especially on that day, being holy Corpus Christi day. To this note the committee replied that the request could not be granted, as it would involve closing some of the schools and greatly interrupting others.

It further appeared that about sixty Catholic children, by direction and command of their parents, were kept from school to attend religious services on said 4th of June, being, as stated in the bill, "holy Corpus Christi day." A few of them applied for admission to the schools in the afternoon of that day, and all, or nearly all, so applied the next morning, when they were told by. the committee that, as they had absented themselves, without permission, and in violation of the rules of the school, which they well understood, they could not return without an assurance from their parents, or their priest, that in future they would comply with the rules of the schools, the committee assuring said children, and many of their parents, and also the priest, that if said schools would not again be interrupted in like manner they would gladly admit said children to them; that said priest and parents refused to comply with such proposal, and claimed that on all days which they regard as holy they may, as matter of right, take their children from the schools without any regard to the rules thereof.

The bill prayed an injunction against the committee, defendants

from preventing the admission of the complainants' children to the said schools, &c.

The opinion of the court was delivered by

BARRETT, J.—[After stating the facts in detail.] The ground and reason of the exemption asked for in this case, as stated in the bill, are, that the parents of said children were members of the Catholic Church, and they were directed by the priest of said church to attend religious services on said 4th day of June and have their children do so, as already more fully stated. The legal ground and reason of the relief prayed for are indicated by the expressions in the bill, namely-"their (the orators') constitutional right to worship God according to the dictates of their own consciences, without being abridged in the enjoyment of their civil rights;" and their "right to exercise parental authority and government over their children as regards their moral training and culture;" which, when put in the form of direct and explicit statement, is in effect, . that the enforcing of the rules of suspension by the committee upon the children of the erators violated the rights of the erators under Art. III. of the constitution of the state; and violated also the legal right of the orators to control their children in the matter of attending the public schools of the district, as against the right of the committee in the same behalf.

It is the duty of this court to decide whether either of these propositions is maintainable. The article in the constitution on which the former of these depends is, "That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no man ought to, or of right can, be compelled to attend any religious worship, &c., contrary to the dictates of his conscience; nor can any man be justly deprived or abridged of any civil right as a citizen on account of his religious sentiments or peculiar mode of religious worship; and no authority can or ought to be vested in er assumed by any power whatever, that shall in any case interfere with, or in any manner control, the rights of conscience in the free exercise of religious worship; nevertheless, every best or denomination of Christians ought to observe the Sabbath, or Lord's day, and keep up some sort of religious worship, which to them s times a consolid so the remoded will of Cod !!

light of that article, the former of these propositions, if critically considered in its relation to the case made by the bill, obviously cannot be maintained; for the action of the committee touches not nor affects the worship of Almighty God by the orators, whether such wership be in one way or another, or not at all; nor does it touch or affect their religious sentiments, or peculiar mode of religious worship; nor does it in any manner interfere with or control the rights of conscience in the free exercise of religious worship. That article in the constitution looks only to the personal conscience of the individual as relates to his personal worship of Almighty God. It looks only to the personal relation of the individual to his God, both as to belief and worship; and not to the relation that the individual may sustain to others in respect to their belief and worship. The not consenting that the children of the orators might leave the schools for the purpose of attending divine worship on the day in question did not touch the belief of the orators as to the character of that day, nor did it touch or control the free exercise by them of religious worship according to their belief and conscience, nor is anything to that effect alleged or intimated in the bill.

Still further, it may be remarked that the bill does not present it as a matter of conscience, either with the erators or their children, that the children should attend service on that day; but only represents that it is a holy day in the church, and accustomed to be observed as such. No divine authority for it is quoted or asserted, and its observance, in this instance, by the orators and their children, by attending religious services, is put upon the direction of the priest, without showing or asserting that anything of religious conscience was involved in obeying, or not obeying, that direction. Yielding to supervening authority exercised by a recognised superior is one thing; but it is not necessarily, nor impliedly, the same thing as obedience to the dictates of the inward monitor and avenger.

Again, when the facts set forth in the answer are considered, it seems very apparent that only the attendance of the orators' children on the morning session of the schools on that 4th of June involved any matter of conscience in relation to the day; for many Cathelics in the village were about their accustomed business and labor during that day as on other days, "and many of their children were at play in the streets and elsewhere during that day,"

and some of the scholars that had been taken from the schools to attend the religious service presented themselves for attendance in school in the afternoon. Hence, as to the matter of fact as shown by the bill and answer, it would be very difficult to find that the observance of the day is binding on the Catholic conscience; and the bill and answer furnish the only legitimate evidence we have on that subject; and this difficulty is considerably enhanced by the fact, that, up to the 4th of June 1874, that conscience had never caused it to be required that the Catholic children should be absent at all from the schools on that day.

It is proper also to state explicitly that, if the action of the committee, either in the making or the enforcing of the rule, was unlawful in this instance, and was the subject of remedy by suit in chancery, or at law, such suit should not be in the name of the parents, but of the children, as the real party plaintiff.

What is thus presented seems to show sufficient ground and reson for holding that the bill cannot be maintained on the proposition as to the constitutional rights of the orators. But having regard to the character of the subject, and to the scope of the arguments that have been addressed to us, we are disposed to consider that proposition in a broader view.

To this end, suppose the children of the orators to be the orators, and to have set forth as true of themselves all that the bill contains as to the church, and the day, and their priest, and the application to, and refusal by, their teachers and committee, and the attending on the religious services, and the being excluded from the schools, and the action of the committee in respect thereto; and to have been answered in every material respect as the bill of the erators is answered. In such case the ground of complaint and remedy would be, that their (the children's) rights under Art. III. had been violated by the action of the committee. Could it be maintained? This is really the question which counsel for the orators seem to regard as being before the court.

This brings into consideration the scope and purpose of that article of the constitution. It is noticeable as bearing on the subject, that this is the first instance of the assertion of what is now claimed for that article. The article was in the original constitution of 1777, and has been continued from that time to the present. In that original constitution, also, the 40th section was, "A school or schools shall be established in each town by the legislature for the conve-

nient instruction of youth," &c. By the revision of 1785—ratified in 1786—that article was changed in phrase, but not in sense or effect, and thus it has remained, being sec. 41 in our present constitution. The legislature, in pursuance of said provision of the constitution, has been continuously making provision for such schools; and such schools have existed and been in operation in all the towns in the state down to the present time, with great variety of detail as to organization, administration and requirement, even to compulsory attendance by force of specific enactment. While those two articles (III. and 41) have thus, side by side, been in force to every practical intent, all forms of religious belief and unbelief, characterising the various sects and denominations of men relatively to religion, and all forms of church organization, based on such forms of belief, have been in existence and operation, with all the details of religious wership and service, professedly involving the conecience and its demands peculiar to each differing sect; and yet this is the first instance in which it has been asserted that the administration of our common public schools, under the contemporary constitution in that behalf and the enacted laws, has violated any rights accorded by said Art. III. It is to be noticed still further, that, while those two articles have been in force, and the successive legislatures have been exacting laws under which schools have been going on through the immediate agency and action of committees and teachers, vested with the same official authority as those now in office, councils of consors, charged by the same constitution with the daty of noting infractions of that instrument by the legislature, and vested with the function of initiating alterations of the constitution itself, have been chosen and in official action every seven years, and yet nobody has suggested that the legislation under sec. 41, or the actions of committees and teachers under that legislation, or that sec. 41 itself, has trenched on anybody's rights of comeciones under said Art. III. This is stated, not as showing that the action of the committee in this case did not violate such rights, but as showing that the present claim for that article by these craters is of need impression, as we say of a proposition, or question of law, when for the first time presented for judicial consideration.

It now behoves that we should call to mind what, as matter of history, was the occasion, and what the purpose of that Art. III. The history of the Puritane in England, and especially of these

who were known as the New England Pilgrims, shows the occasion: and in this regard it is in point to refer to the religious history of the continent of Europe for peveral conturies next prior to the formation of our government. The government of England and the governments of the continent had no written organic constitutions defining the powers of the governing authority on the one hand, and defining and guaranteeing the rights and privileges of . the subject on the other. The subject lived in subordination to the law-making and law-executing power-he individually, or all the subjects collectively, not being recognised as having rights and privileges, only as they should be accorded to them by those pewers. The British idea of the British government was sharply expressed in 1775, in the answer, written by Dr. Johnson, to the resolutions and address of the American Congress-" that the King and Parliament have the power of disposing, without the concent of the subjects, of their lives, liberties and properties." [The italics are in the authentic print.] Sovereignty was not derived from the subjects, but it supervened upon them by "divine right," in the form and character of what was called "the government." Church and state were indissolubly connected, the church degmatising the faith, and the state enacting it into legal, requirement, with disabilities and penaltics. The disabilities on the score of religious faith and practice, which subjects were made to experience—the penalties that confronted non-conformity in England -- the horrors which bunted and avenged imputed hereey, at times, both in England and on the continent, had made those who were not of the religious faith required or approved by the governing powers, and who for that reason had gone forth to the desciptions of the desert and the wilderness to escape the eye, and ear, and arm of such powers, feel and appreciate the importance, in creating governments for themselves, of seeing to it that such governments should not have the right, at least, to subjugate them to like disabilities, penalties and horrors.

In the first constitution of the state of New York, drafted by John Joy, chairman of a committee of his poors in character, and some of them in ability and learning, and adopted on the 20th of April 1777, with but one negative vote in the convention that framed and established it, Art. 88—corresponding to Art. III. in our constitution of the some year—shows in direct expression, the occasion and purpose of the article—an occasion and purpose com-

mon to the colonies then just enfranchised by the Declaration of Independence. I copy thus: "And whereas we are required by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against the spiritual oppression and intelerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind: this convention doth further, in the name and by the authority of the good people of this state, ORDAIN, DETERMINE and DECLARE, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall for ever hereafter be allowed within this state to all mankind: Provided, that the liberty of senseience hereby granted shall not be so construed as to excuse acts of licenticesness, or justify practices inconsistent with the peace and safety of this state."

When our constitution was first framed and adopted, no occasion had been given for regarding the grievance that is now complained of; so, such grievance could not have been in mind as an object specially to be provided against in the making of that Art. III. On the other hand, the government-making people of New England, in the causes that had led to its first settlement by the Pilgrims, and by their children, and by after emigrants and their children, had ever deep and fresh in mind occasion and reason for the provisions of that article. And nothing could more fully, pointedly and specifically indicate the nature of such occasion and reason than the language of the article itself. It was designed by it to secure to every subject equal civil rights, irrespective of his religious faith; so that his being a Catholic or a Protestant—his being a Calvinist, er an Arminian-his being an orthodox evangelical, or a freethinker—his being a Baptist, or a Universalist—an Episcopalian, er a Quaker, should not make him the object of discriminating legislation or judicial judgment to his disadvantage, as compared with those of different faith and practice, so that no law should be aimed or executed against him because he professed and practised ene form of religious belief, or disbelief, rather than another, within the limits of personal immunity consistent with good order and the peace of society under the government. It was designed to debar the law-making and law-administering powers from enecting, or adjudging, that, unless the subject should profess a prescribed system of fiith, and become a member of a prescribed religious organization, and conform in his worship to the prescribed ritual,

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he should not be entitled to the same personal rights, privileges and enjoyments under the government as those who should do so. It was designed to secure absolute equality before the law of all subjects under the law, whatever might be their faith, or notions in the matter of religion. And as a result, may not a Catholic be a Catholic, as freely as a Protestant may be a Protestant, with no law aimed at him because he is a Catholic and not a Protestant? It would seem to be trifling with a momentous subject, to claim that Art. III. was designed to prohibit the legislature from enacting any law, the carrying into effect of which might interfere with the wishes, and tastes, and feelings of any of the citizens in the matter of religion, and even with the performance of religious rites that should be regarded as matter of conscientious duty on the part of some of the subjects of the realm. Government, with reference to the ends designed to be secured and served by its existence and action, is altogether a practical matter-not speculative, fanciful, sentimental, or impracticable. It performs its functions, and works out its results, by the instrumentality of laws enacted and laws administered-laws adapted to the subject-matter of them, and to the accomplishing of the ends designed, and operating equally and alike upon all who come within their scope.

One of the chief ends of the government is to provide means and facilities for developing, and educating, and training the young into virtueus and intelligent men and women. This is recognized and emphasized by the section of the constitution already referred to as to schools; and which since 1786 has been in these words: "Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force and duly executed, and a competent number of schools ought to be maintained in each town for the convenient instruction of youth."

As already suggested, the constitution proceeds upon the assumption that this can be done consistently with Art. III. In pursuance of that assumption, the legislature, through the whole source of our existence as a state, has been active and considerate, in the making of laws for the existence and support and management of what is meant by "schools in each town." In se doing it has never aimed to make, nor has it ever made, any provision that discriminates or distinguishes in its operation, between persons of different religious meta. All are subjected alike to the law and its administration. The Markette who accomb

his camp-meeting as demanding as much of his conscience, as the Episcopalian does his Christmas or Lent; the Episcopalian, who regards the feast and fast days of his church, as demanding as much of his conscience, as the Catholic does his holy "Corpus Christi:" the Congregationalist and Presbyterian, and Baptist, and other sects, who care for none of these things, and whose prayer meetings and protracted meetings demand as much of their consciences, as in the case of the others before named, and the man of no preference and no religion, all, and all their children, are subjected alike to the school laws, and to their administration.

Art. III. was not designed to subjugate the residue of the constitution, and the important institutions and appliances of the government provided by the enacted laws for serving the bighest interests of the public as involved in personal condition and social rolations, to the peculiar faith, personal judgment, individual will or wish of any one in respect to religion, however his conscience might demand, or protest. In that respect it is implied, that while the individual may hold the utmost of his religious faith, and all kis ideas, notions, and preferences as to religious worship and practice, he holds them in reasonable subserviency to the equal rights of others, and to the paramount interests of the public as depending on, and to be served by, general laws and uniform administration. Rights of conscience and schools, under the constitution, were, when that instrument was made, and have been, during all its continuance, to be barmonized with practicable consistency—the schools under section 41 not to be enbordinated to the rights of conscience under Art. III. any more than the rights of conscience under Art. III, are to be subjected to the rights as to schools under section 41.

And, as bearing pointedly on this view, it is of interest to notice the change that was made in the constitution of 1777 by the revision of 1786. Sect. 40 of the former began, as already quoted: "A school or schools shall be established in such town by the legislature for the convenient instruction of youth," and continuing with such salaries to the masters, paid by each town; making proper use of the school lands in each town, thereby to enable them to instruct youth at low prices. One grammar school in each county, and one university in this state ought to be established by the General Assembly." Sect. 41 of that constitution of 1777 was: "Laws for the encouragement of virtue and prevention of

vice and immorality shall be made and constantly kept in force; and provision shall be made for their due execution; and all religious societies and bodies of men that have or may hereafter be united and incorporated for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they in justice ought to enjoy, under such regulations, as the General Assembly of this state chall It is thus seen, that, in the original constitution, "the encouragement of virtue and prevention of vice and immorality " were associated in the same section with the provision for the protection and encouragement of "religious societies, and bodies of men, united and incorporated for the advancement of religion and learning." That section did not embrace or contemplate "the schools in each town "-they, together with "one grammar-school in each county, and one university in this state," constituting the separate subject of the preceding section.

By the revision of 1786, that section 40 was incorporated into said section 41, immediately after the first clause, as is shown by section 41 of our present constitution, already recited. From all which it is plain that, in those early times, religion and learning, under the constitution and the laws to be enacted, were deemed to he compatible, and that schools of all grades, from the "schools in each town" to the university, were to be the subjects of legislation under the constitution; and it is especially plain that the "schools in each town," as early as 1786, were combined with, if not given the precedence to, religious societies and bodies of men, as an instrumentality of the government, by means of laws, "for the encouragement of virtue, and prevention of vice and immorality." In conclusion on this topic, as we cannot improve, so we adopt the language of Judgo Poland, in Williams v. School District in Newfane, 88 Verm. 275: "Without making further reference to the almost numberiess acts of the legislature, exhibiting the most active watchfulness and fostering care for the cause of popular education, enough has already been stated to show that the whole subject of the maintenance and support of our common schools has ever been regarded in this state, as one not only of public worklness, but of public necessity, and one which the state in its severeign character was bound to sustain."

We now receased to remark, that it stands out so plain as not to

be matter for debate, even if it be not expressly conceiled, that schools, in order to realize the intent of the constitution in their behalf, must be subjected to system and order under established rules. Hence, the law charges the committee with the duty of adopting all requisite measures for the inspection, examination and regulation of the schools, and the improvement of the scholars in learning:" Gen. Stat., ch. 22, sect. 89.

Let it be granted that parents and others may, upon their own respective reasons, control the attendance of the scholars, as against the official right of the committee in that behalf, and practically, the ground of system, and order, and improvement, has no existence. For the parents and guardians of the scholars may each on his own motion, and on his own notions, withhold their respective scholars from the schools. In this respect, so far as it effect on the schools is concerned, it makes no difference whether the occasion and motive involve conscience, will, whim or the pocket.

· Now, when this matter of conscience, as against the requirements of the law, is brought to the test, the practical result of what is claimed by the orators in this case is shown to be so impracticable, not otherwise to characterize it, as to preclude further discussion. If a Catholic citizen should be serving on a jury in the midst of a trial, when divine service in his church on boly 4 Corpus Christi" should be in progress, would it be a violation of his rights under said Art. III. to compel him to keep his seat and serve through the trial? The same may be asked of the Jew er the Seventh-day Baptist, who should be required to do like service . ea Saturday. The same may be asked of a devout Methodist, when a camp-meeting or a love-feast should be in progress in his vicinage. If either or all should refuse to serve, would their rights ef conscience under Art. III. be a valid defence in a prosecution for the penalty in such case provided? Suppose a Catholic sheriff should have in his hands some process which it became his efficial duty to serve during the time that divine service in his church on some hely day should be in progress, would his rights of conscience -under Art. III. be a good pica in bar to an action for official default by reason of attending said service "for conscience sake," instead of making service of the process? But enough of test and illustration.

c. Let it be repeated then that, that article in the constitution

was not designed to exempt any person, or persons of any sect, on the score of conscience as to matters of religion, from the operation and obligatory force of the general laws of the state, authorized by other portions of the same instrument, and designed to serve the purposes contemplated by such other portions; it was not designed to exempt any persons from the same subjection that others are under to the laws and their administration on the score that such subjection at times would interfere with the performance of religious rites, and the observance of religious ordinances, which they would deem it their duty to perform and observe but for such subjection. While all stand on equal footing under the laws, both as to benefits and privileges proffered, and as to exactions made, and liabilities and penalties imposed, no one's rights of conscience, as contemplated by said Art. III., are violated in a legal sense.

And it is fitting here to remark, that this court have to dealwith the subject as jurists, regarding the constitution, and the laws, and what is done under them, with reference to principles and reasons that appertain to the subject in its legal elements, qualities and aspects, and not as religionists, not as sectaries, not as those who regard something besides the government as of ultimate supremacy in the affairs of men on earth, but as those who regard the government created by the constitution, and the laws made under the authority, and within the scope of the constitution, as the ultimate sovereignty in this state, and as equally obligatory and effectual upon all. It is not our efficiel duty to discuss, nor our official prerogative to pronounce upon the policy or. propriety of the provisions and requirements of the constitution, er of the laws enacted conformably to the constitution, in view of their bearing upon the matter of personal religion and morals, or on the matter of religious, moral and secular education; but it is only our province to interpret and give application and effect to the constitution and laws as they exist. The court does not make the law, either constitutional or statutory, but only administers it in cases as they are presented for consideration and decision. The part of the opinion in Donakue v. Richards, 38 Maine 879, and the cases cited, which bear on this ground of the present case, are worthy of attention by all who may be interested in the subject.

Pursuing no further the discussion of this ground and aspect of the case, it is proper here to remark, that the note of the prior to the committee did not state any ground for asking for the exempexcluded from the school, because he would not comply with the requirement upon all scholars in grammar, to write compositions. In that case there was no prescribed penalty constituting a part of the rule of requirement, but the penalty was extemporized to meet the exigency. The prerogative of the committee and teacher, both as to requirement and penalty, was maintained. In Landers v. Seasor, 82 Verm. 114, the plaintiff, a boy some eleven years old, some hour and a half after the school had closed for the day, and when he was at his home, and engaged in his father's service, used savey and disrespectful language to the teacher, the defendant, in the presence of some of his fellow pupils. For this the defendant whipped him on his going to school the next morning. The court held the following language: "But where the offence bas a direct tendency to injure the school and bring the master's authority into contempt, as in this case, when done in the presence of other scholars and of the master, and with the design to insult him, we think he has a right to punish the scholar if he comes again to school." Such was the judgment of the court in full bench, upon full argument and careful consideration, and no doubt is now entertained by this court of its soundness and propriety.

In that case there was no prescribed rule, either as to conduct or penalty. But it involved directly the prerogative of the teacher, an against the exclusive authority of the parent over his child, in reference to that child's conduct as affecting the school of which he was a scholar.

In Sherman v. Charlestown, 8 Cushing 160, the plaintiff was expelled from school on account of licentious and immoral character, though not manifested by any acts within the school. The action was founded on a statute of Massachusetts, entitling a party to recover damage for being unlawfully excluded from public school instruction. In that case there was no prescribed rule on the subject, either of requirement or penalty. Ch. J. Shaw, in the course of an opinion which would be instructive and salutary to all to read and pender, says: "It seems to be admitted, if not it could hardly be questioned, that for misconduct in school, for disobedience to its reasonable regulations, a pupil may be excluded. Why so? There is no express provision in the law (as it then was) authorising such exclusion; it results by necessary impliention from the provisions of law requiring good discipline. It proves that the right to attend is not absolute, but one to be an

joyed by all on reasonable conditions." Again, "but the court are of opinion * * * that a power is vested in the general school committee, or the master with their approbation and direction, to exclude a pupil * * * for good and sufficient cause: " Stephenson v. Hall et al., 14 Barb. 222, was an action against the defendants for expelling, as trustees, the daughter of the plaintiff from a publie school. She had been excluded by the teacher, for alleged misconduct, with the concurrence of the defendants. On appeal to the superintendent, she was to be permitted to return to the school on certain conditions of promise as to future conduct, with a confession that she had done wrong. She refused to comply with the conditions. ALLEN, J., in the course of the opinion. says: "it is undoubtedly true that trustees have the power, and it is their duty, to dismiss, or exclude a pupil from their school, when, in their judgment, it is necessary for the good order and proper government of the school so to do."

We have carefully studied the Iowa case of Morrow v. Wood, before cited, and not only find nothing in conflict with the other cases decided, but that the ideas expressed by Judge Coll are in harmony with the other cases. In that case the teacher required a boy to study geography. His father, for good reasons, wanted him to devote himself to other studies, requiring all his time and strength, without geography. The boy, in ebedience to his father's direction, refused to study geography, and the teacher whipped him. Hence the suit. It appears that geography was one of the studies required by law to be taught; but there was no law requiring any scholar, or particular description of scholars, to study it. There was no rule of the school, besides the arbitrary requirement of the teacher, which would make it the duty of the boy to pursue that study.

Judge Coll says: "The statute gives the school beard power to make all needful rules and regulations for the organisation, gradation and government of the school, and power to suspend any pupil from the privileges of the school for non-compliance with the rules established by them, or by the teacher with their consent." It does not appear, nor is it inferable, that the school board had made a rule requiring the boy to study geography, or had given their consent to the requirement of the teacher.

The question then was, whether the teacher had justifiable cause for whipping the boy. The court held, that she had not, and in the

discussion, held that, on the facts in the case, the father had the right to direct as to the study of geography by his son. We see no occasion for differing with the court in that case. course of the opinion it is said, "it is not proposed to throw any obstacle in the way of the performance of their duties" by the school board. Again, "we do not propose to lay down any rule which will interfere with any reasonable regulation adopted for the management and government of the public schools, or which will operate against their efficiency and usefulness. Certain studies are required to be taught in the public schools by statute. The rights of one pupil must be so exercised undoubtedly as not to prejudice the equal rights of others. But the parent has the right to make a reasonable selection from the prescribed studies for his child to pursue, and this cannot possibly conflict with the equal rights of other pupils. In the present case the parent did not insist that his child should take any study outside of the prescribed course." "And how it can result disastrously to the proper discipline, efficiency and well-being of the common schools to concede the paramount right to make a reasonable choice from the studies in the prescribed course which his child shall pursue, is a proposition we cannot understand." And this, as well as all that was said by the judge, is to be taken as said in a case where there was no rule as to the study of geography by the boy, except the personal arbitrary command upon him of the teacher. court would decide in a case involving the question of superiority of authority between the parent and the school board, as to the pursuit of a study required by the established rule of the board, we have now no occasion to announce or intimate. Nor had that court any such question before it.

In this connection it is interesting to refer to the case of Spiller v. Weburn, 12 Alien 127, in which a girl, by direction of her father, refused to bow her head during prayer at the eponing of the school, and where the father refused to request that she might not be required to, the rule on that subject providing that scholars would not be required to, whose parents should request that they might not be so required. Ch. J. BIGELOW delivered the opinion of the court, which held that it was lawful for the committee to expel her from the school for such disobedience to the rule. And further in the same connection, the case of Spear v. Cummings, 28 Pick. 224, is worthy of attention, in which Ch. J. Shaw says,

"The law provides that every town shall choose a school committee, who shall have the general charge and superintendence of all the public schools in such towns;" that "this includes the power of determining what pupils shall be received and what pupils rejected. The committee may, for good cause, determine that some shall not be received, as, for instance, if infected with any contagious disease, or if the pupil or parents shall refuse to comply with regulations necessary to the discipline and good management of the school."

These cases show the judicial views that have been held on the embject under consideration, and suffice for the present.

Recurring now to what is stated in the answer, as to the manner in which the rule has been administered, it is proper to remark. that the lawfulness and propriety of the rule are not to be tested or adjudged, upon the presumption that the penal part of it will be unjustly or unwarrantably enforced. The presumption is the other way, vis.: that it will be administered justly, and upon, and with reference to, warrantable occasion. If a case should arise in which it should appear that the penalty had been inflicted outside of or beyond the fair scope and reason of the rule, it would be both the province and the duty of the courts to accord proper remedy. But, as before demonstrated, this is not such a case; and this leads to the further remark, that the remedy is not sought in this case as against the refusal of leave to be absent on the 4th of June; but as against the imposing, as the condition of remitting the penalty, a promise that absence for a similar cause should not be repeated that term. Such promise being refused, the penalty of exclusion was not remitted, and the children did not return to the schools. And hence the position assumed by the orators—the same as already stated—that the committee had not the lawful right to exclude scholars who should be absent by the direction of their parents, contrary to the established rule of the school.

As before intimated, this position takes no account of any difference of occasion or reason for such direction of parents, whether it be religious service, or secular employment, or amusement, but is on the ground only of the right of the parent as against the rale of the school. In reference to that position, in explicit statement, as the result of the discussion, it is held, that scholars of a school are amenable to the school authorities as to their conduct as scholars affecting the school, netwithstanding the prerogative of

their parents in respect to them.

This, however, does not imply that committees or teachers are the ultimate judges whether their measures, either by prescribed rule, or extemporized, expedient or impulsive act, are lawfully requisite or proper in a given case. The statute, in imposing the duty of adopting all requisite measures, &c., does not confer ultimate jurisdiction on committees of the question whether a particular measure is requisite or not, within the sense and intent of the statute. When such question of langulness under the statute is made between a party, against whom the measure operates, and the committee or teacher, that question is open before the courts for consideration and decision, in view of all that apportains to the subject of it. The rule in question in this case, and the enforcement of it, are subject to the judgment of the courts as between the parties to the suit. It is easy to suppose cases in which such enforcement would be beyond the lawful right of the committee. The rule itself, in terms and intent, contemplates exclusion as a penalty only where permission to be absent is withheld for want of resonable cause shown. In case of casual sickness of the scholar -of sickness or death in the family of the scholar-of some impediment, like fire or flood—in case of various incidents of current life, giving occasion for temporary absence, the enforcement of the penalty of exclusion would, under circumstances, be adjudged to be unauthorized under the statutes and law by which the subject is governed.

It is not intended by this to be held that there may not be cases in which the decision and action of the committee or teacher would not be deemed judicial and final. That subject has been involved in many of the decided cases, under peculiar statutes, especially in Maine and Massachusetts. We have no occasion to pronounce upon it further in this case.

Upon the facts shown, we are unable to find any warrant of law for maintaining the bill.

The decree dismissing it is affirmed.

The following soon to be the leading facts upon which the case rests:—

1. There is a distinct refusal of the teachers to allow the Catholic children to about themselves from the school, in order to attend the service of their thurch on hely days, and a pervisent "the to demand the centrary, upon

penalty of continued exclusion from school.

- 2. This is confirmed by the committee, and what is said about the short or imperfect natice is clearly waived by persisting in the claim.
- 2. There can be no doubt the 4th of June was a high festival in the Roman

church, and that the teachers knew the day before that this church so regarded it, and desired their children to attend the services.

- 4. There can be no question both the parents and the priest desired, and required, the children to attend service in church on that day, and that this was sufficiently made known both to the teachers and the committee.
- 5. There can be no question also that, with all this knowledge, both teachers and economittee concurred in refusing permission.
- 6. It seems equally clear that they also concurred in refusing such children as attended the service, permission to return to the school, except upon their assurance that it would not be repeated, thus clearly treating them as being in the wrong for attending such service, and that they might rightfully be puntished for the same.

These facts being established, two questions seem fairly involved in the case. (1.) Whether in case of conflict the conductors of the school may lawfully insist upon their fules and regulations, setting aside those of the church where the children receive religious education : in other words, how far school education may interfere with or supersede religious education 1 (2.) How far the school laws or regulations will control the right of the parents to direct the attendance of their children upon religious services, and expose the children to punishment for obeying their parents in this respect f

The surver to these questions will depend upon the laws of the state. The provision of the Constitution will, of course, override all legislation upon the subject in conflict with such provision. The clause bearing directly upon this point, as stated in the opinion, is:

"That so authority out or ought to be rested in, or assumed by any power whatever, that shall in any case interfere with, or in any tagger control the victor of

conscience in the free exercise of religious worden." We have emphasized these words because they seem to as possilarly expressive of a settled determination in those who ordained them, as the perpetual basis of religious freedom in the state, to leave no ground for misunderstanding or evasion. If these words do not place the rights of conscience in regard to freedom of religions worship, above logislative control. then it seems to us difficult, if not lunpossible, to conceive of any which would have that offeet. And the history of these provisions in the other American state constitutions, and the motives which induced them, as fully set forth in the opinion, would not allow us to suppose the framers of these constitutional provisions meant anything less than their words import.

And when we come to look into the laws of this state in report to schools, we find no provisions extendated to justify the exercise of any such interference with religious wership as was here attempted. Every town is reexirci to maintain "one or more schools for the instruction of the roung. in orthography, reeding, writing, English grammer, goography, arithmetic. history, and Constitution of the United States, and good behavior." We should be somewhat at a loss to coniceture upon what ground any governor of the schools, under these previsions, could assert any such stringest discipline as was attempted in this cass. It is pretty certain that compalling the children to disoboy their parents, er punishing those for refering to do so, would not, ordinarily, he regarded as the natural mode of teaching "good behavior!" to them, or it surely would not have been so regarded when that provision in the statute was first incorporeted into the school laws of the And we cannot respect any one would believe any such stringency AP Atentation + Atomos 11 P

cooful teaching of any or all the branches of study required by the statute. But if we may suppose that to have been the fact in this case, it will not conclude the rights of these who compose the school, since no school regulations can possess authority superior to the statute, and no statute of that character sould everride an express constitutional provision to the coutrary. We must conclude, therefore, that the defendance were not justified in what they did, became the Constitution of the state guarantees entire immunity from all interference with religious worship to all its inhabitants.

It searcely seems necessary to allude to the suggestion, whether there can be any question of conscience involved in estobrating "Corpus Christi" in the Roman church. It is confraeedly one of Its high festivals, and has been so for hundreds of years. But there seems to have been some idea thrown out, that it might be eclobrated at an hour not' interfering with the schools. But this suggestion probably proceeds from went of knowledge of the requirements of that shurch. Such a festival con only be properly colobrated by high mass, where the church have the masteal appliances for such masses, and this must be substrated before 12 o'clock, mean, and must therefore begin as early as 9 o'clock, A. M.; and all will feel the absurdity of requiring it to begin at 8 A. z., le order to finish before echoel hours This is, in fact, never done is that church, if it be allowable even, which we question. At all events, if the rights of weedle are mode by the organic lew of the state, superior to legislative control even, it would seem Notice has then abound to have rules of school attendance attempt to overrule the essent of the charch, which have been observed for hundreds of years, Agy such untimely colchration of the day would not be, to the devout werdipper, a colubration at all. And who

would wish to train up his children in so irregular a manner ! We think this matter is not fully comprehended by most of the Protestants. They have no daily service and no great festivals. Their week-day mostings are held mostly in the evenings, and it does not occur to them why the Cathelia church may not do the same. But that church is bound to have daily morning service throughout the year, and on fastivals, high mass, and all hefore 12 o'clock noon. So that it will require them to begin at midnight, as it were, certainly at a very inconvenient hour, at some seasons of the year in this high latitude, in order to finish before school hours. And then, the children would be in no condition to perform their school duties after so protracted a service in church. It is evident that these who argue for such an accommodation must do it under some misapprehension of the facts. And what is said shout those parents or pricets, not considering the day too hely for their children to play in the streets in the afternoon, must equally proceed from similar misesproheusien. That church never considers it may departure from the strictest observance of its festivals to recreate in the afternoon.

Even their facts are not observed so much by long-facedness as by head fide shatiannes and solf-denial. No branch of the Cothelic church over regarded Sunday any more secred than its other factivals, but less so than many others; that is wholly a Protestant idea and mainly Purion.

Possibly Protestants would comprobond this question more fully, if we supposed the lowe of the state to require the scholars in the common schools to attend some moral or philosophic leature, in some grand half, on Banday morning from 9 o'clock to 12 o'clock. And there is nothing to binder the legislature doing this, except this same Act. III., granuatying freedom of religious worship, which does indeed also · declare that every denomination of Christians eacht to keep up " some sort of religious worship" on the Lord's day. But every other legal provision for rendering that day more secred then any day, consists in more statutory provistens, which may be repealed say day, and then nothing would be less imprehable than to require all the common school children to hold a kind of masieal or other artistic service, devoted to the gods of the day, as has been done before in other states or countries'; and how could any one say, such a service would not be "some kind of religious worship" within the Constitution! We de not doubt some of the descendants of the Puritans would be able to comprobond that this would be an essential abridgment " of the rights of considered in the free exercise of religious worship." They would feel it more because it interfered with their worship on Sunday. But there can be no question, the Roman church, or the English church and its American branch, consciontionaly regard some of its festivale, falling on week-days, for more secred then an ordinary Sunday, and so equally of the services. We need not specify beyond Christmas and Holy Thursday or Assension day, as to the English church. And from what we have seen of the mode of celebrating "Corpus Christi," on the continent of Europe, we make no question that is one of their greatest days. The seme may be said of the Feast of the Pariflestion, or Candlemas, which is calebrated in St. Peter's, Rome, in a style of magnificent display infinitely beyond that of an ordinary Sunday. It is only Rester day that is properly called the Lord's day in the Catholic church as the anniversary of the recurrection. The other Sundays in the year are called so by overtesy. The underiable fact that we Protestante have become a kind of Sunday Christians, renders it difficult for us to comprehend what burdens we are " . It is greatly to be found that we are

really laying upon charekenen, when we require their children to absent themstives from church and actually assend school upon the most secred fasts and festivals of their church. We believe nothing more is required to induce justies in regard to these matters, then a faller comprehension: of the real facts in those energ. It is only very recently that the courts and the schools have discontinued their resolves on Christman and Good Friday. And even now some of the courts require to be informed, that in holding resolute on Good Friday they are but giving countenance to the precedent of Postles Pilete.

There can be no doubt in this case the children were required to disobey their parents, and were punished for not doing so. They might as well have been subjected to corporal punishment as to exclusion from school. Then the each would have been precisely parallel with that of Morrow v. Wood, 18 Am. Law Roy. N. S. 692, and the able and judicious opinion of Mr. Justice Cols would fully apply to this case. Since the common schools have been compolled, by the controllety of epision upon religious subjects in the country. to virtually abandon all instruction upon the subject, it must not be enposted that it can be also telerated in a Christian country, that they should be allowed to teach positive irreligion, or what directly conflicts with Christian teaching upon morals. The first great command of the Decalogue, as to our duty to each other, it, " Henor thy father and thy mother." There could then be nothing more in conflict with Christian teaching than to require the children to dicaboy their percents. It is ereditable, we think, to the Roman charch that their children were too well taught in their primary duty to their. parents to obey the school, when it came to a conflict between the school and their percents.

all quite too indifferent to the general offers of so magnifying the authority and window of the common schools in the eyes of the children, above their parents, in all matters even remotely pertaining to education, and at the same time teaching the children that mere text-book knowledge is superior to all other attalements. There can be Made doubt, this may have contributed more than we comprehend to that general disregard and disrespect among the young toward their elders, which is so much deployed by many. But when it comes to the mester of religious teaching, which is so exclusively under the course of the parents, and by the very organic law of the state mode sacred above all other rights, it might be supposed no one could fall to comprehand the unresembleness of the chilm here made. What is said in the Ovastitution of the state about the duty of maintaining schools, and the consequent necessity of their claims being vindicated by the course, is all very well. But it must be remembered that she provisions in the Constitution about

schools are subordinate to those securing freedom of religious worship. And if we make the case under consideration our own, we shall all be able to comprehend that the demands of the school authority here were most unreasonable and without either law or necessity. We think it unfortunate, both for the interests of the schools and the quiet and good order of the country, that any class of Christians should have been subjected to such hard measures in defining religious freedom, the thing above all others of which we boost the loudest. It seems to us far wiser to mete out to all the most liberal meacares upon this subject, especially where, as in the present case, it must be somended by all that they offer a very planeible, if not, as we think, as invincible legal vindication of their claim. By so doing we shall be able to secure the support of the clearest popular sonviction in support of the decisions of the courts, in refusing all countenance towards clearly unreasonable and illegal demands of that character.

LT.R.

Supreme Court of New Brunswick.

EUROPEAN AND NORTH AMERICAN RAILWAY COMPANY ... GEORGE McLEOD.

The plaintiff company was about being organized, and defendant was asked to take stock in it, and subscribed his name to a paper prepared for that purpose, agreeing to take ton shares. Hold, that this was an offer made by the company on the one side, and accepted by the defendant on the other, and that a complete contract was formed, which made him liable as a stockholder to assessments.

Held, also, that it was not necessary that certain shares designated by numbers should be assigned to defendant, to make him liable.

This was an action of debt to recover a balance alleged to be due from the defendant as a subscriber for stock in the European and North American Railway Company.

. It appeared at the trial that a meeting to organize the plaintiff company under the Act of Incorporation was held on the 30th May 1864, when directors were chosen, a secretary and tressurer

appointed, and by-laws passed defining the duties of the president and secretary, the mode of calling special meetings, the form of certificates of shares and the manner in which they were to be signed, &c. A committee was also appointed to obtain subscribers for stock. The persons who agreed to take stock in the company subscribed their names on a sheet of paper, called "The Stock Subscription List," which had the following beading :—

"The European and North American Railway Company for extension from St. John, westward.

"We, the following persons, whose names are subscribed hereto, do hereby agree to take, and do take, the number of shares in the capital stock of the aforesaid company set opposite to our respective names, subject to the aforesaid Act of Assembly incorporating said company, and the aforesaid by-laws of the said company and the laws of this province."

Sharen, \$60 each.

Among a large number of subscribers in this list, the defendant's name appeared as a subscriber for ten shares—his name, occupation, and the number of shares, all being in his own handwriting.

Evidence was given that assessments had been made and failure by defendant to pay.

ALLEN, J., after stating the pleadings and facts in the case, continued:—The first question is, whether the defendant was a stockholder in the company? I think there is a clear distinction between this case and the English cases that have been referred to. There is nothing in the act incorporating this company, or in any of our acts relating to corporations generally, defining what shall constitute a stockholder. Both the act of incorporation, and the Act 82 Vict. c. 5-1, speak of "subscribers" for stock, and of the stock being "subscribed for;" and many other acts of incorporation use similar expressions, tending to show, it seems to me, that when a company is about being organized, and persons are asked to take stock in it, and subscribe their names to a paper prepared for that purpose, agreeing to take a certain number of shares, if the company is organized under its charter, the persons so subscribing their names become liable as stockholders in the company. It is an offer made by the company on one side, and accepted by the person so subscribing his name, on the other, and therefore becomes a complete contract. This, in my spinion, constitutes the distinction between this case and Pellatt's Case, Law Rep. 2 Ch. 527; Gunn's Case, Law Rep. 8 Ch. 40, and a number of other English cases, decided under the Winding-up Act. In each case, the question is, whether there is a contract. Lord CAIRNS says. in Pellatt's Case: "I think that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is ne contract. * * * I cannot, therefore, consider an application for shares, followed by a registration, not communicated to Mr. Pellatt, to constitute a complete transaction." But where, as in the present case, the authorised agents of a company apply to an individual and request him to take shares in the company, and be assents, and subscribes his name to the stock-list, stating the number of shares he agrees to take, what more is needed to complete the transaction? Had the defendant in this case applied to the company for shares, then I admit there would have been no contract until they assented, and communicated their assent to him; but that is not the state of facts here. It is also contended that the shares should have been numbered, and that the defendant was not a stockholder until the company sesigned ten shares to him, distinguished by certain numbers. But where is the obligation to number them? The act of incorporation does not require it. It is true, the by-laws of the company contemplate that certificates of stock should be issued to the stockholders, and the form of certificate shows that it was intended that the shares should be distinguished by numbers; but would the omission of the company to issue a certificate, or to describe in it the numbers of the shares, or to misdescribe the numbers, deprive a stockholder of his shares? I think not. The certificate does not constitute the contract between the company and the shareholder, though it may be evidence of it against the company. It was also contended that unless the shares were numbered, they could not be seized under an execution, as provided by 1 Rev. Stats., cap. 119. But I do not assent to that proposition. I see no difficulty under that act in seising shares in a company, though they are not distinguished by any particular numbers. The act says, that "The shares of stock of every stockholder in every incorporated joint-stock company, shall be personal estate and liable to be seized and sold as such. The officer executing the execution shall leave a certified copy thereof with the clerk, secretary or cashier of the corporation,

who shall give the sheriff a certificate of the number of shares held by such execution-debtor; and the shares therein so liable shall be deemed seized when such copy is left, and shall be sold, &c.; and on producing a bill of sale from the sheriff, the officer of the corporation, whose duty it is to register the transfer of shares, shall transfer to the purchaser the shares so sokl." Now, what more is necessary than that the officer of the company should give the sheriff a certificate stating how many shares the debter owns? And if they have never been numbered, or, if numbered, the officer does not state the numbers in his certificate, but merely states (what the act requires of him) that the debter holds five or ten shures, as the case may be, will that prevent the sheriff from selling those five or ten shares, and the purchaser from being registered as the owner of them in place of the original helder? If the shares were of different values, then I could understand the necessity of numbering them, to distinguish one class from the other; but where all are of equal value it would seem to be immaterial whether they were numbered or not-the sheriff could sell the whole, or a certain number of the shares, and no confusion could arise for want of their being numbered. The cases of The Newry of Enniskillen Railway Co. v. Edmonds, 2 Exch. 118; The Weiverhampton Waterworks Co. v. Hawkeford, 7 C. B. N. 8. 795, and The Irish Peat Co. v. Phillips, 1 B. & S. 629, have been relied on by the defendant's counsel; but two of these cases turned upon the particular words of "The Companies Clauses Consolidation Act." which declares in sect. 8, that every person who had subscribed the prescribed sum to the capital of the company, and whose name had been entered on the register of shareholders. should be deemed a shareholder of the company; and in sect. 9. that the company should keep a book to be called "The Register of Shareholders," in which should be entered the names and additions of the persons entitled to shares in the company, together with the number of shares to which such shareholder should be entitled, distinguishing each share by its number, and that the book should be authenticated by the seal of the company affixed thereto. In actions for calls in the first two of these cases, it was held, that to constitute a person a holder of shares, the company was bound to prove that his name was on the register. It is true. that Enu, C. J., in delivering judgment in The Weberhampton Watermerks Co. v. Hawkeland save 4 Me shares had b

bered, and no specific shares had been appropriated;" but the real ground of the decision was, that the defendant's name was not on any register of shareholders, such as the company was required by the act to keep; this appears by the judgment of the Exchoquer Chamber in The Irish Peat Co. v. Phillips, where it is said that The Wolverhampton Waterworks Co. v. Hawkeford was no authority for the decision of the Court of Queen's Bench; which was, that shares were not created so as to make the alleged owner liable for calls thereon until the shares were specifically numbered and appropriated by number. In the case of The Irish Peat Co. v. Phillips, the sharter of the company required that all proprietors of stock should execute a dood of settlement, whereby the capital should be divided into a certain number of shares, to be numbered in regular succession, beginning with No. 1. A deed of settlement was prepared containing these provisions (substantially the same as "The Companies' Clauses Consolidation Act)," but the defendant did not execute it; and on that ground it was held that he was not a shareholder, nor liable for calls. Neither of these cases, then, seems to me to support the position taken, that the defendant in this case is not liable because no shares were numbered by the company, and, as such, allotted to him; and I am unable to come to the conclusion, that a numbering of the shares was cosential to constitute him a stockholder. But in addition to this, the act of . imporporation says, that if "any subscriber, or stockholder," shall " neglect to pay any assessment on his shares, the directors may order such shares to be sold, and if there is any deficiency, " such delinquent subscriber or stockholder shall be held accountable," &c. The Act 32 Vict., c. 55, uses the terms, "subscribers for shares," and "subscribers to the capital stock;" and the third section authorises the company to sue for, recover and receive " from any subscriber the amount due for unpaid subscribed stock which may have been subscribed for by such subscriber." Surely it cannot be disputed that the defendant was a subscriber for stock in this company, even if any doubt could exist about his being a stockholder. In the report of the case of The Wolverhampton Waterworks Co. v. Howkeford, in 6 C. B. N. S. 886, on domurrer to the declaration, the judgment for the defendant was put expressly on the . ground that the statute gave the remedy for calls against "sharehelders" only, and not against "subscribers" simply; and the declaration did not allege that the defendant was a " stockholder."

But by the act under consideration the power to sue is not confined to stockholders, but is expressly given against subscribers; and therefore whether the words "subscriber" and "stockholder" were used indiscriminately in the act, and as pointing to the same set of persons, as was said in The West London Reilway Co. v. Bernard, 18 Law J. Q. B. 68, or otherwise, seems to me to be immeterial. As regards their liability to pay calls, I think there is no distinction between a subscriber for stock and a stockholder. For these reasons I think this objection ought not to prevail.

The next objection was, that the stock was subscribed subject to the provisions of the act of incorporation and the by-laws of the company; that they formed conditions precedent to the defendant's liability, and that the company had not performed the conditions. These alleged conditions are to be found in the second section of the act of incorporation, which declares that the capital stock of the company shall consist of \$2,000,000, to be divided into forty thousand shares of \$50 each; and in the fifth section, which authorises the president, directors and company "to make such equal assessments from time to time on all the abdres in the said corporation as they may deem necessary and expedient." The objection is, that the first assessment made on the 16th July 1867. was not an equal assessment on all the shares, because it expressly excluded the \$250,000 of stock subscribed in the United States. If this objection is not cured by the Act \$2 Vict., c. 54, I think it must prevail. * * * [The judge's description of the act is emitted as not of general interest.]

On this ground, therefore, I think the first assessment was illegal. But admitting the first assessment to be bad, on account of the exclusion of the subscribers for stock in the United States, will the inclusion of that assessment in the notice which was given by the president of the company, under the Act 32 Vict., c. 54, and the sale of the defendant's stock for the non-payment of that, together with the nine subsequent assessments, vitinte the sale? It seems to me that it will not do so. The objection of inequality does not apply to any but the first assessment; and there is no such connection between them as that one defective assessment should destroy all the others. Each one stands on its own merits, and, if legally made, gives a separate cause of action, though a preceding one may be defective. For the payment of such as were

Buffelo Steam Engine Works v. The Sun Mutual Inc. Co., 17 Id. 401, cases which have been followed by the courts of every state whose attention has been called to the subject since, it is held that where a mortgagor insures, loss, if any, payable to his mortgagee, or where a mortgager insures and assigna, with the consent of the underwriter, to his mortgagee, a subsequent breach of the conditions of the policy by the mortgagor avoids the policy. Why? Because in both these cases, it is the mortgagor's interest which is insured. The discussion in both these cases proceeds upon the supposition that had it been the mortgagee's interest which was insured, as it was in Foster v. The Equitable Mutual Fire Ins. Co., by reason of his having given new premium-notes upon the assignment to him, the act of the mortgagor would have had no such effect. Although the decisions in 17 New York were followed in Massachusetts, in Hall v. Mochanics' Inc. Co., 6 Gray 185, and Loring v. Manufacturers' Ins. Co., 8 Id. 169, yet the principle decided in Fester v. The Equitable Mutual Fire Inc. Co., has been since affirmed in the case of Lawrence v. The Holyeke Inc. Co., 11 Allen 887.

It follows from this, that an alienation other than by the "insured" does not avoid a policy. Hence we may conclude that if a firm be insured, the alienation by a partner of his individual interest, especially to his copartners, is not forbidden; but, on the courtrary, that the real purpose and intent of the parties in agreeing to the language used in the policy, is to prevent alienation to third persons by the firm, which shall introduce strangers into the proprietary interest and control, unless by consent of the company: 32 N. Y. 412; Burnett & Martin v. The Enfaula Home Inc. Co., 46 Ala. 11; Pierce v. The Nashua Pire Inc. Co., 56 N. H. 297; Angell on Inc., sect. 197. An insurance policy is to be most strongly construed against the underwriter: May on Inc., sects. 174, 175.

Matthewe, Ramsey of Matthewe, for defendant in error.—The single question presented by the record is, whether the assignment by one of the partners, to his copartners, of his interest in the policy and property insured, before loss, defeats the recovery of the plaintiffs. The affirmation of this proposition is sustained by May on Insurance, sect. 280; Doelers v. Æine Inc. Co., 18 Ma 128; Floriders on Insurance 428. And see Hoffman v. Æine

Ins. Co., 32 N. Y. 405, where the history of the law on this question in the state of New York is given: Tillou v. Kingston Mut. Ins. Co., 7 Barb. 570; 5 N. Y. 404; Murdock v. The Chenange. County Mut. Ins. Co., 2 Counst. 210; Wilson v. The Geneses Mut. Ins. Co., 16 Barb. 511; Hobbs & Hurley v. Memphis Ins. Co., 1 Sneed 444; Howard & Ryckman v. The Albany Ins. Co., 3 Denio 301; Tate v. Mutual Fire Ins. Co., 13 Gray 79; Wood v. Rutland & Addison Mut. Ins. Co., 31 Verm. 552; Barnes v. Union Mut. Fire Ins. Co., 51 Me. 110; Hexsis v. Previdence Mut. Fire Ins. Co., 6 R. I. 517; Finley v. Lycoming Co. Mut. Ins. Co., 30 Penna. St. 318; Buckley v. Garrett, 47 Id. 230; Baltimore Fire Ins. Co. v. McGowan, 16 Md. 47; Dix v. Mercantile Ins. Co., 22 Ili. 277; Keeler v. Niagara Fire Ins. Co., 16 Wis. 528; Hartford Fire Ins. Co. v. Rose, 23 Ind. 181; Decker & Bumb v. Ætna Ins. Co., 18 Mo. 128.

JOHNSON, J.—The question in this case arises on a demurrer of the defendant to the petition, alleging that said petition did not state facts sufficient to constitute a cause of action.

The plaintiffs suc as individuals, and not in the partnership name, and claim to recover on a policy of insurance against fire, on a stock of goods in Indianapolis, for one year, from April 17th 1869 to April 17th 1870.

The original policy was issued April 17th 1836, for one year, and was renewed each year thereafter, the last renewal being on 17th of April 1869. It was issued to the firm of H. F. West & Co., composed of the plaintiffs and one Henry F. West, who, on the 1st of December 1869, retired from the firm, and assigned all his interest in said policy and stock of goods to his copartners, the plaintiffs, who continued the business.

The stock of goods was consumed by fire, December 17th 1869. Hence this action.

By the terms of the policy, the defendant contracted "to make good to the insured, their executors, administrators or assigne, all such immediate loss or damage as shall happen by fire to the said property."

Upon the foregoing facts but one question is presented. That is: Did the assignment by Henry F. West of his interest in the policy and stock of goods avoid the policy or prevent a recovery

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thereon—the assent of the company to such transfer not having been given thereto? This question must be determined by giving a construction to the terms and conditions of the policy. In form and language, it is an agreement between two parties, the insurer and the insured, though executed only by the insurer.

The only clause relating to such a transfer is in the words following: "And it is further agreed * * * that if this policy, or any interest therein, shall be assigned, unless, in either case, the assent thereto of said company be endorsed hereon, these presents shall thenceforth be null and void."

It will be observed that this policy (which is part of the record) is a contract with a partnership, and not with the individuals composing it; that, as such partners, they owned the stock of goods, and were doing business therewith in the usual way.

It is also important to note that the policy contains no provisions relating to alienation of the property, or prescribing any mode of continuing the policy, in case of sale of the goods, by obtaining the assent of the company thereto. Such provisions are to be found, we believe, in most insurance contracts.

The clause above quoted relates only to the assignment of the policy, or any interest therein, and is silent as to the alienation of the property insured.

Ordinarily, this omission is unimportant, for it is well settled that in such case, when the insured, by alienation or otherwise, parts with all his insurable interest in the property insured, he cannot, in case of loss, recover, because, having no interest in the property destroyed, he has sustained no damage. Neither can the assignee of the policy, without the assent of the insurer, recover, because he is a stranger to the contract, whom the company is not bound to recognise.

In the examination of the numerous cases cited, this omission is an important element, as very many of them turn on the words limiting and restricting alienation. Thus, in Dix v. Mercantile Inc. Co., 22 Ill. 277, and The Hartford Inc. Co. v. Rose et al., 28 Ind. 179, there was this clause, upon which the cases largely turned: "And in case of any transfer or change of title in the property, or of any undivided interests therein, such insurance shall be void and cease." They were cases much like the one before us; and stress is laid by the court on the words "undivided inter-

ests," as correctly describing a partner's interest. So, also, in many other cases, the peculiar wording of these clauses relating to alienation enter largely into the discussion of the legal aspects of the case, in the opinion of the courts deciding them.

As to such clauses, it is sufficient to say that, as a general rule, their only effect is to either enlarge or restrict the right, which exists without them, to bring an action by the assured in case of loss. If the assured still retains such an infurable interest in the property, as that he sustains a loss by the fire, he can, to the extent of that loss, recover; otherwise, if he has parted with all such interest, for then no damage has resulted to him.

Great care should also be taken to distinguish between those cases decided by an application of the common-law rules of pleading and those which are made to depend solely on the rights of the parties growing out of the terms of the contract itself. The former depend on who are the proper parties to the action at common law, the latter on the terms of the contract; and from these terms the court must determine the existence, extent and character of the obligations and liabilities of the parties to the contract. The one is to be decided by the rules of pleading, the other by a construction of the stipulations of the policy.

Since the adoption of our code, under which the real party in interest may sue, whother the contract is joint or several, the former class of decisions becomes unimportant. There can be so doubt that if the common-law rules of pleading were in force in Ohio, the plaintiffs could not recover—not because they had no insurable interest, for they owned all the property covered by the policy; nor because they sustained no damage, for that is admitted; but solely for the reason that this was a joint contract by the incured, and all must be joined as plaintiffs. By these rules, if all were so joined, they still could not recover, because Henry F. West, one of the joint contractors, had parted with all his insurable interest by a sale. In either case, the result would alike be fatal to these plaintiffs, who have sustained all the less against which they were indemnified; and the rights of the parties, and the liabilities of the insurers, arising from the terms of the policy. would remain undetermined by the court.

In Murdock v. The Chenange Inc. Co., 2 Count. 210, one tenant in common sold his interest in the property insured to his contenant. The action was in the name of Action the com-

pany had assented to the sale. It was held that the misjoinder was fatal. On the other hand, Tate v. Citizens' Inc. Co., 18 Gray (Mass.) 79, was a case like the former, except that the action was in the name of the co-tenant, who had become sole owner by purchase. It was held that the non-joinder was alike fatal, Judge Bicklow saying: "Upon familiar principles, both the joint contractors should join in bringing the action, * * and the omission to join them is a good defence."

In both cases, the parties were sent out of court without their rights adjudicated, by the application of the "familiar principles" of common-law pleading.

Under the code, the real party in interest must sue. In this case the suit is properly brought, but the right of recovery does not depend on questions of misjoinder or non-joinder of parties, but upon the liability of the insurers growing out of the contract. Is the defendant therefore liable to the plaintiffs by the terms of this policy? To determine this question, reference must be had to the familiar rules of construction.

The policy should receive a reasonable interpretation. Its intent and substance should be accertained from the language employed. Its stipulations should have full legal effect, to guard the insurer against fraud and imposture. As it is a contract of indemnity to the insured, it should be liberally construed in his favor, not only because this mode of construction is most conducive to trade and business, but because it is probably most consonant with the intentions of the parties. There is no more reason for a strict compliance with its terms than ordinary contracts. There is nothing in such a contract intrinsically more sacred or inviolable than a contract about any other subject: 25 Wend. 874. Exceptions in a policy should be strictly construed, and when there are two interpretations equally fair, that which gives the greater indemnity should prevail: May on Insurance, sect. 174.

None of these rules is more fully established or more imperative and controlling than that which declares that it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity, which, in making his insurance, it was his object to secure; and when the words "without violence" are susceptible of two interpretations, that which will sustain the claim and cover the less must in preference be adopted: May on Insurance, sect. 175.

Guided by these principles, let us examine the terms, which, it is claimed, avoid this policy.

The natural reading of these terms, "if this policy or any interest therein be assigned," would seem to be completed by adding after the word "assigned" the name of the contracting party, so as to read, "if this policy or any interest therein be assigned by said H. F. West & Co." H. F. West & Co. alone could make an assignment of the title to the policy. Henry F. West did not assign the policy or any interest in it which the firm had. The partnership name must be used to transfer the policy or any definite interest therein.

The cases are numerous where it has been held, that is constitute alienation of the property, a conveyance of the title, and nothing short of this, would amount to an alienation; that "transfer of the title of property insured," means the title and ownership of property insured, and not the interest of the insured there is: Masters v. Madison County Inc. Co., 11 Barb. 624.

A sale by one partner to another is not such an alienation as will avoid the policy, even under an express condition that the policy shall become void: Angell on Ins. 197.

A mere change of interests or ownership among partners, where no stranger is introduced, and no addition made to the number of the insured—when there is no change in the condition or situation of the property or risk—a mere assignment of his interest, by one partner to the other, is obviously not within the principle or motives on which the condition is founded: Pierce v. Nachua Pire Inc. Co., 50 N. II. 297.

Henry F. West assigned his interest in the policy. What was that interest? Not any aliquot part of the whole, for they were partners seized "per my et per tout" of the common stock of goods: West v. Skip, 1 Vesey Sr. 242.

It was his share of the capital stock remaining after satisfying all partnership domands. When title to property, real or personal, is in a partnership, and is owned by it, it is clear that the conveyance by one partner of his interest conveys no greater interest than remains after all the domands against the firm are estisfied. If this firm had been insolvent when the policy was assigned—that, counting the insurance money as part of the assets, it could not pay its debte—then nothing was in fact assigned. For angles the court knows, this may have been so in this case.

The contracting parties were the insurers on the one hand, and H. F. West & Co. on the other. The language is clearly succeptible of the construction we have given. The one claimed by defendant seems strained and unnatural, and calculated to defeat rather than carry out the intention of the parties.

It does violence to all settled rules of constraing contracts.

Conditions of this kind should not be extended by construction beyond the reasons for their adoption, especially when, as in this case, it defeats the contract. The chief reason for requiring such a stipulation is to guard against the introduction of a stranger, who may not possess the fidelity or watchfulness required by the insurers. The change should increase the hazard.

In a case of a clause of this kind it was held that a sale or conveyance to the assured does not defeat the policy, though within the words of the provise against the sale or transfer. The interest of the insured being thereby increased, the case did not fall within the reason and spirit of the provise: May on Ins., sect. 275, and cases cited.

To say that H. F. West & Co. shall not assign the policy, or any interest therein, without consent, is a reasonable condition; but to say that the partners inter sees may not change their respective interests, is not within the spirit and reason of the clause. The presumption is, that the company had faith in all the partners; the increase of plaintiff's interests, as we have seen, would but make them more watchful; the retiring partner no longer had a motive to endanger the insurer; no stranger was introduced; no one but these with whom the contract was made was left in control.

There being no adequate reason to support this enlarged construction, we cannot adopt it.

It is suggested that this clause was intended to secure the continuance of Henry F. West, in whom the company reposed special souldence, and without him the policy would not have been issued. In reply to this, we adopt the language of the New York Court of Appeals, in Hoffman v. Ætna Inc. Co., 82 N. Y. 411, in a similar case:—

They testified their confidence in each of the assured, by issuing to them a policy, but did not choose to repose blind confidence in others who might succeed to the ewnership. The only evidence of their confidence in either partner is in the fact that they contrasted with all; and the theory is rather funciful than sound

that they may have intended to conclude a bargain with rogues on the faith of a proviso that one honest man should be kept in the firm to watch them.

"It was intended by the provise to protect the company from a continuing obligation to the assured; if the title and beneficial interest should pass to others they might not be equally willing to trust. Words should not be taken in their breadest import when they are equally appropriate in a sense limited to the object the parties had in view."

There is still another rule equally at variance with the defendant's claim. Stipulations in a contract providing for disabilities or ferfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced. To seize on words introduced in the policy as a safeguard, and make them available to defeat the claim of the assured on the theory of a technical forfeiture, is in no possible view permissible. If the policy admits of such a construction, it is due to the dexterity of the draughtsman, and not to the meeting of the minds of the parties: 32 N. Y. 414.

We conclude, therefore, that the clause under consideration, in connection with the facts disclosed, does not avoid the policy, and that the plaintiffs are entitled to recover thereon.

Finally, the question arises—shall these plaintiffs recover the whole that II. F. West & Co. might have recovered, or only their individual shares? Does the sale by Henry F. West avoid the policy as to his undivided interest?

In Hobbe & Hurley v. Memphis Ins. Co., 1 Sneed 444, a case much like this as to its facts, it was held, as to the share or interest of the retiring partner, the plaintiffs could not revover, but only for their own interest in the firm; while in Hoffman v. Einst Ins. Co., 82 N Y 415, 416, where the same question arosa, it was decided otherwise. The court there say: "There is no reason why the full measure of indemnity should be withheld from the pinintiffs, who were owners at the date of the incurance, and sele enthese at the time of the loss." We concur in the reasoning of the court in that case, and its conclusions of law on this point.

These plaintiffs were parties to the contract; they editioned to conduct the business contemplated by the policy; there was no substantial change material to the risk, and none within the meaning of the clause under consideration. The policy was intended

to protect the interest of each and all; and its language, fairly construed, is in harmony with that intent.

We are aware that the conclusions we have reached are at variance with the greater number of reported cases, but we believe these conclusions rest on the firmer and more satisfactory ground of sound principles, and that they are more conductive to substantial justice—the aim and end of all law.

Judgment reversed, and cause remanded for further proceedings.

Scorr, Chief Judge, DAY, WHITMAN and WRIGHT, JJ., con-

Supreme Judicial Court of New Hampohire. RICE v. MERRIMACK HOSIERY CO.

In proceedings in equity, whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, must be alleged positively in the bill. Such essentiant degree of certainty must be adopted as will give the defendant full information of the case which he is called upon to answer.

The laws of a foreign state operate beyond its territorial limits only az comitate. The courts of a state where the laws of such foreign state are sought to be enforced, will use a sound discretion as to the extent and mode of that country. They will not permit their tribunals to be used for the purpose of affording remedies which are dealed to parties in the jurisdiction of the state that exacted the law, and which tend to operate with hardship on their own citizens and subjects.

A creditor of a corporation, created under the laws of Ohio, filed a bill to enforce the individual liability of the stockholders of the corporation. The corporation had no assets in this state, and none of its stockholders resided here. The bill contained no recital by what remedial process the individual liability of stockholders is enforced in that state. Held, that country does not require the courts of this state, in the exercise of a judicial discretion, to give effect here to the statutes of that state.

In Reuter. The bill was as follows: William A. Rice, in behalf of himself and others, creditors of the Merrimack Hosiery Company, who shall come in and contribute to the expenses of this suit, complains against the said Merrimack Hosiery Company, an association of individuals claiming to be a body corporate and politic, and to have and possess certain corporate powers, under and by virtue of the laws of the state of Ohio, and R. A. Holden, of Cincinneti, in the county of Hamilton, and state of Ohio, and Ira S. Holden, of Baltimere, in the county of Baltimere, and state of Maryland, and Edgar B. Thomas, of Indian-

apolis, in the county of Marion, and state of Indiana, and William Wood, of Cincinnati, aforesaid, and A. Shepard, of Compton, in the county of Kenton, and state of Kentucky, as follows, to wit: The said Holdens, Thomas, Wood and Shepard, as the plaintiff is informed and believes, on the 2d day of July 1868, associated themselves with one Charles W. Beal, of Cincinnati, aforesaid, now deceased, and perhaps with sundry other persons to the plaintiff unknown, under the laws of the state of Ohio, as an association or joint-stock company, under the name of the Merrimack Hosiery Company, claiming certain corporate rights and powers under the laws of said state, with a capital stock claiming to be \$50,000, with its principal office in Cincinnati aforesaid, for the purpose of conducting in Bristol, in the county of Grafton, the business of manufacturing, by machinery, knit hosiery and other goods, and each of said parties owned or claimed to own stock in said company; that, by the laws of said state of Ohio, as the plaintiff is informed and believes, each and every steckholder in said company was then, and is now, liable for any debt due by said company to any laborer employed by said company in carrying on its manufacturing business; that, some time subsequent to their organization as aforesaid, the said defendants, under the name aforesaid, commenced the business of manufacturing, by machinery, knit hosiery goods, at Bristol aforesaid, and the plaintiff and quadry other persons went into their employ as laborers in said manufacture; that the manufacture so commenced was carried on by them until some time in April, or the 1st of May 1872, when they stopped the business of manufacturing aforesaid, after having removed from the state most of their property, except the mechinery with which said manufacturing had been carried on; and, after repeated promises by the defendants and their agents that the business should be resumed, but which promises were as often broken, their property was attached, under process from the court in this state, and on or about the 10th day of December 1872, upon a petition of one of its creditors, the said Merrimack Hesiery Company was adjudged a bankrupt under the laws of the United States.

While the said company were doing business at Bristol aftersaid, and before its adjudication in bankruptcy as afterioid, it became justly indebted to the plaintiff, for labor and services done and performed in and about its business, to a large amount, to wit. the sum of \$1500, which is still due the plaintiff. And the plaintiff says that, at the time said debt was contracted as aforesaid, nor since, has be any knowledge, except from reports, as to whether said Holdens, Thomas, Wood and Shepard, either alone or with others, were associated together, under the laws of Ohio, as a corporation, or whether they had corporate powers, or whether the capital stock, if they had any, was paid in, or how it was owned, or whether they were mere partners in business, and by means thereof jointly and severally liable for all debts contracted by them; or, if they were a corporation under the laws of said state of Ohio, whother they had done and performed such acts as by said laws would relieve them, as stockholders, from personal liability for the plaintiff's debt; and as to all and singular of said facts, queries and claims, the plaintiff prays the said defendants may be compelled to prove the same by competent evidence, if they claim the benefit thereof. And the plaintiff avere that all said defendants had notice of his debt, contracted as aforesaid, and a demand was made upon said company more than sixty days before the filing of this bill, to wit, on the 1st day of November 1872; and, by means of the premises aforesaid, the plaintiff avers that the defendants, whether as stockholders of the Merrimack Hosiery Company or as partners, became and were, personally, jointly and severally, liable to pay the same; yet they have not paid the same, nor any part thereof, but refuse so to do. And the plaintiff also avers, that the said Ira 8. Holden owns a large amount of real estate, to wit, of the value of \$8000, situate in New Ipswich, in the county of Hillsborough, in this state, over which said court has jurisdiction.

Wherefore the plaintiff prays that the said defendants may come to a just and fair account of the sum due the plaintiff upon the demand aforesaid, and that they may be decreed to pay the amount so due to the plaintiff, and for such other relief as may be just.

The defendants demurred to the bill, and assigned the following causes: 1. No equity on the part of the plaintiff is disclosed in the bill. 2. The plaintiff has a plain and adequate remedy at law. 3. Upon the allegations in the bill, the plaintiff is not entitled to the relief prayed for. 4. The assignes of said hosiery company, in bankruptcy, should be made a party. 5. The bill is, in all respects, uncertain, informal and insufficient. 6. The plain-

tiff's only remedy is to be had in the proceeding in bankruptcy, mentioned in the bill.

The questions raised by the demurrer were transferred to this court by Foster, C. J.

Barnard, for the plaintiff.

Carpenter and Blair, for the defendants.

SMITH, J.—I. One of the causes of demurrer assigned is, that the bill is uncertain, informal and insufficient; and the bill is clearly open to this objection. It is an elementary rule, that the bill should state the right, title or claim of the plaintiff with accuracy and clearness; and should in like manner state the injury or grievance of which he complains, and the relief which he asks of the court. The other material facts ought to be plainly yet succinctly alleged, and with all necessary and convenient certainty as to the essential circumstances of time, place, manner and other incidents: Story's Eq. Pl., sect. 241. Whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged positively. It is not a sufficient averment of a fact to state that a plaintiff " is so informed:" Lord Uxbridge v. Staveland, 1 Vescy 56-or to say that a defendant alleges and the plaintiff believes a statement to be true—Egrement v. Cowell, 5 Beav. 620; nor is an allegation that the defendant sets up certain pretences, followed by a charge that the contrary of such pretences is the truth, a sufficient allegation or averment of the facts which make up the counter statement: 1 Danieli's If every fact necessary to entitle the Ch. Pl. & Prac. 412. plaintiff to the relief prayed for is not distinctly and expressly averred in the stating part of the bill, the defect cannot be supplied by inference or reference to averments in other parts: Wright v. Dame, 22 Pick. 55.

The bill charges that the defendants, with one Beal, since deceased, organized an association or joint-stock company, July 2d 1868, under the name of the Merrimack Hosiery Company, as the plaintiff is informed and believes, and perhaps with sundry other persons to the plaintiff unknown, under the laws of the state of Ohio, with a capital stock claimed by them to be \$50,000, for the nurpose of manufacturing goods at Bristol in this county, and having its principal place of office in Chainnati. Ohio: that the

deeds relating to their estates: Ryore v. Ryoes, 8 Ves. 848. That ones, in the loceeness of its statements and in the uncertainty of the facts essential for the plaintiff to know in order to make out his case, seems to find its parallel in the one now before us. In short, the rule, as laid down, is as follows: "It is absolutely necessary that such a convenient degree of certainty should be adopted as may serve to give the defendant full information of the case which he is called upon to answer: 1 Daniell's Ch. Pl. and Prac. 421; Creest v. Mitten, supra; Wormuld v. DeLiele, 8 Beav. 18.

But, if we should assume that the defendants were duly organized into a corporation under the laws of Ohio, and if we should assume that the statutes of Ohio, if they had been recited in the bill, would show what the plaintiff has alleged-that each stockholder is liable for any debt due by the corporation to any laborer employed by it in carrying on its manufacturing business-there would still remain insuperable difficulties in maintaining this suit. The laws of a foreign state do not operate beyond its territorial limits ex proprio vigore, but only ex comitate. The courts of a state, where the laws of a foreign state are sought to be enferred, will use a sound discretion as to the extent and mode of that comity; they will not permit their tribunals to be used for the purpose of affording remedies which are dealed to parties in the jurisdiction of the state that enacted the law, and which tend to operate with hardship on their own citizens and subjects: Erickson v. Nesmäh. 15 Gray 221. The liability which the plaintiff seeks to enforce is a more creature of the statute, having none of the elements of a contract, whether express or implied: it is a naked, statutory liability, entirely unknown to the common law, for the indebtedness of the corporation however it may accrue, whether from the breach of a contract or the commission of a tort. The stockholder is not liable upon the contract in the one case, nor for the tort in the other, but, under the statute, for the debt against the corporation which may grow out of either: Hicke v. Burns, 88 N. H. 141. In order to arrive at a just conclusion in this case, it is important to know by what proceedings this liability is enforced in Ohio. By the statutes of New Hampshire, proceedings to suferes the liability of stockholders, under our laws, must be by bill in chancery. 'A creditor, seeking to embree it, must join in the suit all the parties in interest who can be affected by the decree; the sait must be presented for the benefit of all the creditors, and not

for a portion of them. All the stockholders whe can be reached by the process must be made defoudants. The corporation itself must also be joined; and thus, by avoiding a multiplicity of suits, the whole liability of the corporation is apportioned among the solvent stockholders, who can be reached by the process of the court, and by the decree each stockholder is compelled to pay his proportionate share of the debts: and thus, in one suit, the affairs of the corporation are practically wound up, and its burdens distributed equitably among the shareowners: Hadley v. Russell, 40 N. H. 109; Erickson v. Nasmith, 46 N. H. 271.

In Erickson v. Nesmith, 15 Gray 221, which was a suit at law brought to enforce the personal liability of a stockholder, residing in Massachusetts, of a corporation established in New Hampshire, for a debt of the corporation, the Supreme Court of that state, in the exercise of a sound discretion, refused to permit such suit to be maintained, upon the ground that the plaintiffs were seeking to enforce the liability against a citizen of Massachusetta, by a remedy denied to them in the courts of the state whose statutes created such liability; and because, if the suit could be meintained, it would operate with greater hardship on the citizens of Massachusette than the remedy provided by the statute itself, and which alone they could pursue in New Hampshire.

The same creditors subsequently brought a suit in equity against Nesmith and others, stockholders of the same corporation, residing in Massachusetts (reported 4 Allen 288), said suit being brought in behalf of all the creditors, to enforce their claims against the stockholders, under the provisions of the statutes of this state making the stockholders individually liable for the debte of the corporation. It was held that the bill could not be maintained. In the opinion of the court, DEWEY, J., remarked as follows: " If this be so, we perceive at once strong reasons why each a bill should be brought in the state which created the corporation, and where the same is located by the express terms of its charter, and where its place of business is. The effect of maintaining such a bill is to draw before the court all the creditors of the corporation, all the stockholders, and, necessarily, as we should suppose, the principal debter-the corporation itself. The fact of the residence of a single stockholder in Massachusetts, who might be liable in a New Hampshire corporation in common with a hundred eteckholders residing there, would, upon that hypothesis, transfer to our jurisdiction all such stockholders and all the creditors, and authorise us to hear and adjust all conflicting questions as to the indebt-school of the corporation, who were stockholders, and what were the equities between them.

reasons for holding that, in case of an existing corporation, the debt sought to be recovered of a stockholder should be first established by a judgment of court. If this be doubtful, it is, at least, necessary that, before such debt be established by the proceedings in the bill in equity, the corporation should have been made a party to the bill: Begardus v. Resendale Manuf. Co., 8 Seld. 151. But we have no jurisdiction that will reach such corporation out of this commonwealth, and having no assets here; and the same is true of the stockholders residing in New Hampshire. A bill in equity in Massachusetts is, therefore, not the remedy intended to be prescribed by the statute of New Hampshire creating and regulating the liability of stockholders in a manufacturing corporation in New Hampshire."

In the suit between the same parties in this state, reported in 46 N. H. 871, SARGENT, J., in commenting upon the above decision of the court in Massachusetta, said, "The result of the suit in Massachusetts was what might have been expected. The plaintiffs, in going to another state to try to enforce upon its inhabitants the special provisions of the laws of New Hampshire, would be very likely to find their mistake, that the stockholders in Massachusetts did not belong to any corporation in that state to which the Massachusetts laws, to which alone they were amenable, had any application."

The defendant corporation was organized under the statutes of Obie; it has its principal place of business there; the most of its stockholders probably reside there; if it has any assets, they will probably be found in that state; none of the stockholders are residents of this state; the corporation has no assets here; it has been adjudged a bankrupt; only one of its stockholders has any property within this state; and there is no recital in the bill by which we can be informed by what remedial process the individual liability of stockholders is enforced in that state. Under such circumstances I do not think comity requires us, in the exercise of a judicial discretion, to give effect to the foreign statutes here. Being without information as to the remedy afforded in Ohio, it

might happen that we should afford a remedy here which is denied to persons in that jurisdiction, and which would not be allowed to persons seeking to enforce a similar right under our own laws. It is hardly necessary to add, that if the defendants are not a corporation, but are a partnership, the plaintiff has a plain and adequate remedy at law.

The defendants' counsel has argued at great length, and with signal ability, that the liability created by the statutes of Ohio, being entirely unknown to the common law, no action either at law or in equity can be maintained in this state on account of or to enforce that liability. But in the view we have taken of this case we have not found it necessary to consider that question except incidentally. Several other questions raised by the domarror we have also had no occasion to consider.

Ousnike, C. J., and Ladb, J., concurred.

Demurrer sustained.

I ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPPEME COURT OF THE UNITED STATES.²
SUPPEME COURT OF MICHIGAN.²
SUPPEME COURT OF NEW HAMPSHIRE.⁴
SUPPEME COURT OF PENNSYLVANIA.³

AMENDMENT.

Bill to enforce Implied Trust—Accoment of express premise to perform Trust not a new Cause of Action—Trust resulting from payment of Purchase-money.—A bill in chancery was brought for the purpose of enforcing a trust in regard to certain land, and alleged an express trust. It was proposed to amend the bill by inserting allegations of facts from which a trust resulted. It was objected that the resulting trust was displaced by the express trust, and that the amendment would introduce a new cause of action. Ifeld, that it was no objection to the implied trust that it was alleged that the defendant had expressly premised to perform it, and that the object of the bill as amended being to

Prepared expressly for the American Law Register, from the original epialeus. The cases will probably appear in 1 or 2 Otto.

^{*} From W. C. Webb, Esq., Reporter; to appear in 16 Keness Reports.

^{*} From Hoyt Post, Esq., Reporter, and Honry A. Chancy, Esq. Cases decaled at April Term 1876. The volume is which they will appear cannot yet be indicated.

From J. M. Shirley, Req., Reporter; to appear in \$6 New Manushire Reports.

^{*} From P. F. Smith, Req., Reporter; to appear in 79 Femma. St. Reports. Vol. XXIV.—78

enforce substantially the same trust, the amendment did not introduce

a new cause of action: Hall v. Congelon, 56 N. II.

It being alleged that the money with which the land was purchased was the plaintiff's money, Hold, that it was no objection to the implied trust that the defendant furnished the money by way of loan, and that the plaintiff had agreed that he should hold the land by way of security until the money had been repaid: Id.

Assiovment.

Dividend on whole Ulaim—Not on Balance—Assigned in Trustee for will Creditore whether accured or not .- Smeid assigned for the benefit of creditors his real estate, being subject to three judgments to Graeff, who anid it under the judgments; the proceeds were brought into court and decreed to be paid to Graeff; two judgments were paid in full and the third in part. In the distribution of the personal estate in the hands of the guees, the court below decreed a dividend on the whole of the unpraid judgment only. I leld to be error: the dividend should be on the whole amount of all the judgments until he should be paid in full, if a pro ruth dividend would reach that: Gracf's Appeal; Meilf's Appeal, 79 Penna.

Upon an assignment for the benefit of creditors, the property of the assignor is in trust for the benefit of all his creditors, without regard to the nature of the securities they hold; the ereditors are the equitable owners: Id.

Gracif's interest was the extent of his schole claim; the payment in full of one judgment, nor the fact that real estate was first resurted to, did not change his position: Id.

BAILMENT.

For what arglect Builes is responsible—Lisidenes on question of Negligrace—Ilow for Bank responsible for Act of Cashier,—('ollateral facts iscapable of affording resecusible presumption as to the principal matter in dispute, are inadmissible as evidence, as tending to draw the minds of the jury from the issue and to prejudice and mislead them: First National Bank of Carlisle v. Graham, 79 Penna.

Where a bailment is for the sole benefit of the bailor the bailes is answerable only for gross neglect; when solely for the benefit of the bailes, he is responsible for slight neglect; when reciprocally beneficial to

both, the bailes is responsible for ordinary neglect: Id.

A bailes keeping the property of the bailer with the ordinary care. with which he keeps his own, does not falfi his duty, if the contract · requires strict diligence and extraordinary care: Id,

Where the benefits are reciprocal, the balloe is liable for neglect of erdinary care, although he has been careless and reckless in the mea-

agreement of his own goods as well as those of the bailor: Id.

That the bailes has deak with his own goods and the beiler's in the same way, is evidence in adjusting the standard of duty and deciding the question of performance, and as a test of the bailee's good faith. It would raise a presumption of adequate diligence: Id.

The measure of the bailer's responsibility is to be determined in each

case by a comparison with the eneduct of classes of man, not of individuals: Id.

The were voluntary set of the eachier of a bank in receiving securities for safe-keeping, will not render the bank liable for their less; but if the deposit be known to the directors and sequicosed in, the bank will be liable: Al.

BILLS AND NOTES. See Pertnership.

Acceptance of Bill of Exchange by Parol—Lex loci contractus.— Matters bearing upon the execution, the interpretation and the validity of a contract, are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remody, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought: Banker v. Union National Bank, B. U. U. S., Oct. Term 1875.

Therefore, whether a contract shall be in writing or may be made by perol, is a formality to be determined by the law of the place where it is made: Id.

Unless forbidden by statute, it is a rule of law generally that a promise to accept an existing bill of exchange is an acceptance thereof whether the promise be in writing or by parel: Id.

CONTRACT. See Bills.

Government Contract—Power of Secretary of the Navy—Settlement.

—Where the secretary of the party possesses the power under the legislation of Congress, and the orders of the president, to enter into one-tracts for work connected with the construction, arms used or equipment of vessels of war, he can suspend the work contracted for, when from any cause the public interest may require its suspension; and where such suspension is ordered he is authorized to settle with the contracter upon the compensation to be paid for the partial performance of the contracts: The United States v. The Corlies Steam-engine Company, S. C. U. S., Oct. Term 1875.

When a settlement in such a case is made upon a full knowledge of all the facts, without conceniment, misrepresentation or frued, it is equally binding upon the government as upon the contractor: Id.

CORPORATION,

Union Pacific Railroad—Relations with United States.—The Union Pacific Railroad Company concoding the right of the government to retain one-half of the componention due it for the transportation of the mails, military and Indian supplies, and to apply the same to reimburue the government for interest paid by it on bonds issued to the component of its railroad and telegraph lines, brought suit to establish its right to the other moiety. The United States, on the other hand, having paid interest on these bonds in excess of the same credited to the company for services rendered by it, insisted upon its right to withhold payment altogether. Held, that the Act of Congress of 1862, incorporating the Union Pacific Railroad Company, and the purposes contemplated by it, show that Congress never intended to impose on the corporation the obligation to pay current interest; and

lawfully made: The United States v. The Union Pacific Railroad Co., S. C. U. S., Oct. Term 1875.

Contracts made by Promoters before Charter—Corporation liable, if benefits accepted and enjoyed—Minerity of Promoters ennot bind the others.—Where a number of persons not incorporated but associated for a common object, intending to procure a charter, authorize acts to be done in furtherance of their object by one of their number, with the understanding that he should be compensated; if such acts were necessary to the organization and its objects and are accepted by the corporation and the benefits enjoyed, they must be taken cum onere and he compensated for: Bell's Gay Railroad Co. v. Christy, 79 Penna.

In such case the promoters of the enterprise must be a majority of them. A minerity could not bind the association or corporation: Id.

COURT.

Diagrament of Judges as to Reasons for Judgment.—Where a majority of the court agree in the judgment that ought to be rendered but diagree as to the reason for such judgment, such judgment must be entered; but it is useless to give the opinion of the several judges, for thereby no point of law is nottled or decided (Folts v. Merrill, 11 Kans. 479): Railroad Co. v. Hubbard, 16 Kans.

DELIVERY. See Sale.

DIVIDEND. See Assignment.

DIVORCE.

Extreme Cruelty—Comprency of Children on Witnesses.—Upon the trial of a libel for divorce on the ground of extreme cruelty, only two assaults upon the libellent by the libellee were proved, and those of not a very aggravated nature. It was in proof that the libellee used very violent language towards the libellant, cursing her, and applying indecent epithets, and conducting himself so as to terrify his wife and children, and make living with him intolerable. Held, that there facts furnished evidence from which the judge who heard the cause was authorized to find that the charge was supported: Day v. Day, 56 N. H.

Upon such trial, a boy ten years old was offered as a witness. He appeared to have no knowledge of the nature of an oath. Having been first instructed by the court upon that point, he was permitted to testify.

Held, that he was properly admitted: Id.

If a child under the age of nine years is found, after examination by the court, to powers a sufficient sense of the wickedness and danger of false ownering, he may be sworn, and admitted to testify: Id.

EVIDENCE. See Disorce; Libel; Negligence.

Opinions of Non-professional Witnesses. Insanity—Practice—Kight to Open and Close.—Non-professional witnesses, who are not subscribing witnesses to a will, may testify to their opinions in regard to the sanity of the testator, when founded upon their knowledge and observation of the testator's appearance and conduct: Boardman v. Woodman, 47 N. H. 120; State v. Pike, 49 N. H. 399, and State v. Archer, 54 N. H. 468, upon this point, overruled: Harriy v. Merrill, 56 N. H.

The party who afterms that a will was duly and legally executed, has the burden of arcof. and the accommension duty of commine, and the

right to close, no matter in what form the issues for trial may be drawn:

INTERBOT.

Usury-Powers of the National Government.-The National Bank Act of Congress of the 3d of June 1864, inter elia, makes the following provisions: (1.) The rate of interest chargeable by each bank is to be that allowed by the law of the state or territory where the bank is situated. (3.) When by the laws of the state or territory a different rate is limited for banks of issue organized under the local laws, the rate so limited is allowed for the national banks. (8.) Where no rate of interest is fixed by the laws of the state or territory the national banks may charge at a rate not exceeding seven per cont. per annum. (4) Knowingly reserving, receiving or charging "a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the interest which the note, bill or other evidence of debt earries with it, or which has been agreed to be paid thereon." Held, that the phrace " a rate of interest greater than aforesaid" has reference not merely to the proceding sentence, which relates to banks where no rate of interest is fixed by law, but to all the foregoing clauses; and that therefore the consequences of usury where such rate is fixed, is not to be governed wholly by the local law upon the subject: National Bunk v. Dearing, 8. C. U. S., Oct. Term 1875.

The states can exercise no control over the national banks nor in any wise affect their operation except in so for as Congress may see proper

to permit: Id.

In the United States the powers of government may be divided into four classes: these which belong exclusively to the states; these which belong exclusively to the national government; these which may be exercised concurrently and independently by both; and these which may be exercised by the states, but only with the consect, express or implied, of Congress: Id.

JUDGMENT. Bee Chart.

LIBEL

Action for Libri-Pleading-Evidence.—On the trial of an action for libel, it appeared that the original writing, the publication of which was the foundation of the suit, was among the records of the very department at Washington. Hold, that secondary evidence of its existence and contents was properly admitted: Corporar v. Bailay, 56 N. H.

The alleged libel contained charges against the plaintiff so payments in the noval service of the United States stationed at Personneth, and requested his removal. Held, that a letter from Vice-admiral Person, while in charge of the department, to the plaintiff, making the removal, and stating the reasons for it, was admirable, as an act of the department: Id.

The plaintiff was permitted to testify that he sold his farniture at a lose, upon his transfer from the naval station at Portugueth. Hold, no same for setting eside the verdict in his favor: Id.

The allegations of a special plea of justification in such case must be

proved substantially as laid. Hence, where such piece set up specific facts, going to show that the charges were true, and other facts showing that the occasion was lawful and the and justifiable, and alleged that such was the fact, Held, that the court properly refused to charge the jury that if the alleged charges are true the plaintiff cannot recover; size, that the jury were properly instructed, among other things, that, if the occasion was lawful and the alleged libel true, the verdict should be for the defendant: Id.

Whether an alleged libel is a privileged communication, is a question

for the jury under proper instructions from the court : Id.

NATIONAL BANKS. See Beilment; Interest.

Texation of by States.—The provision of the Act of Congress of February 19th 1868, that taxation on national bank stock shall not be at a greater rate than is assessed upon other moneyed capital in the states, relates only to the rate, and does not prohibit the states from exempting any subjects from taxation. Per Graham, P. J.; adopted by the Burreme Court: Gorgas's Appeal, 79 Penna.

Stock of National Banks liable to School-tax in addition to State-tax.—A school tax was assessed on national bank stock in 1870, which was unpaid. On the 19th of January 1871, the bank paid the state tax of one per cent., being the tax of 1871, under Act of April 12th 1867, nest. b. Held, that the holder of stock was not exempt from the school tax of 1870: Carliele School District v. Rephyrn, 79 Penna.

The state assessor assessed the stock at \$150, the par value being \$300, the return was duly made and there was no appeal. [Init], that a tax imposed by the sabool directors on that valuation was not void; if the assessment was wrong the remody was by appeal to the auditor-

general under the Act of April 2d 1868: Id.

NEGLIGENCE. See Bailment.

Escape of Fire from Locometice—Circumstantial Evidence—Remote Injury—Questions of fact for Jury.—Negligones on the part of a reliread company in permitting fire to escape from its engines may be shown wholly by circumstantial evidence, and it is not necessary in such a case that any direct proof of any particular act of negligones should be introduced: Railroad Co. v. Bulas, 16 Kans.

Where circumstantial evidence, tending to show negligenes on the part of a railroad company in permitting fire to escape from its engines, is introduced by the plaintiff, and the defendant company afterwards introduces direct and positive evidence tending to show the contrary; Hold, that it is a question for the jury to determine which evidence in

entitled to the greatest credit: Id.

Where fire, which is negligently permitted to escape from an engine of a railread company, does not fall upon the plainteff's property, but falls upon the property of another, setting it on fire, and then spreads by manus of dry grass, stabble and other combantible materials, and passes over the laude of arveral different persons before it reaches the property of the plaintiff, and faulty reaching the property of the plantiff, at a great distance from where the fire was float kindled, note it on

fire and consumes it: Mold, that the negligeness of a railroad company, in such a case, is not too remote from the injury to the plaintiff's preperty to constitute the basis of a cause of action against the company:

The proper quentions to be considered in such a case are as follows:

(1.) Was the railroad company negligent in permitting the fire to encape? (2.) Would the plaintiff's property have been destroyed by fire as it was destroyed, except for the fire permitted to encape from the company's engine? (3.) Could the railroad company, by exercise of reasonable diligence, at or before the time of permitting said fire to escape, have anticipated the burning of the plaintiff's property on likely to occur and as the natural and probable consequence of permitting said fire to encape? And these are all questions of fact entirely for the jury to consider and determine under proper instructions from the court:

Speci of Steam-care in City—May be regulated by Ordinance—Contributory Negligence by (Third—And Parents.—A shill about nine years old was sent by his mother, who resided in Harrisburg, near defondants' railroad, on an errand across the road; whilst on the track he was killed by an engine going westward; there were iron-works and houses for the hands on the opposite side of the road at that point, which was in the entskirts of the city; and the hands of the works and other persons were frequently crossing the track about the place. Rost of where the boy was struck was a curve, which prevented the engineer from seeing him till within too short a distance to stop the train after he was seen. There was no ordinance of the city limiting the rate of running traine at that point. There was evidence that the train was running at a rate of speed which was safe and prudent under the circumstances, was for the jury: Pennsylvanic Railroad Company v. Lewis et uz., 79 Penns.

It is not common prudence or ordinary care for trains to enter the outskirts of a city at a dangerous rate of speed, although the people have no right to go on the railread track: Id.

Although persons on a railroad track are trespensers, regard must be had to the habits, character, condition and circumstances of a people living in a city and immediately on the line of a railroad; Id.

The Commonwealth by its police power may regulate positive rights when for the safety, protection and welfare of the people; and the speed of trains through towns and cities may be regulated by ordinance: M.

When it is determined by the jury on the facts submitted to them that the rate of speed of a train is incompatible with public sefety under the circumstances of the place, the rights of a company even on its own track are qualified by the law of the public good: Id.

The court charged': "If the boy (being on the track) had sufficient judgment and discretion to know his danger, and did not exercise the ordinary care that one of his age and maturity should, he was guilty of such negligence as would prevent him from recovering," &c. Midd not to be error: Id.

There was evidence in this case of contributory negligence by the parents as to expusing their see to danger, and submitted with proper instructions: Id.

PARTNERSHIP.

Right of liquidating Partner to give Firm-notes.—A firm dissolved in May, giving nutice by publication and authorizing one as the liquidating partner to use the firm name for that purpose; in August, without the knewledge of his fellows, he drew notes psyable to the firm, endorsed them with the firm name, had them discounted by bankers with whom the firm had never had dealings; the proceeds of the notes persed to the individual credit of the partner making them; there was evidence that the proceeds were applied to the firm debts. IIcld, that if the notes were bond fide for liquidation and the proceeds applied to payment of firm dobts, the other partners would be liable: Lloyd et al. v. Thomas et al., 79 Poose

RAILEDAD. Bee Negligenes.

BALE.

When Contract Complete—Delivery most Significant Fact, but not Conclusive.—The plaintiff sold defendant certain logs lying in Bad River, and received \$50 on account of the price. He (plaintiff) was subsequently to run the logs down stream as far as the limits of the Bad River Beeming Company, where they were to be measured. The price was to be \$8 per M. The logs were delivered to the Booming Company, but defendant never received them: Held, That where under a contract for sale of personalty something remains to be dune, as to identify the property, or to fix the price to be paid, &c., the presumption is that title is not to pass until such act has been accomplished, but such presumption is not conclusive. The question is one of mutual amont, whether the minds of the parties have met, and by their understanding the purshacer has now become owner: Wilkinson v. Holiday, S. C. Mich., April **Term** 1876.

Delivery is the most significant fact to prove transfer of title, but it is not conclusive; parties may agree that title shall not pass until the measurement be made to determine the amount of the price to be paid: Id.

As to the delivery in this case, the real question was, for whom was the Booming company beiles after they received the logs? And while the fact that the defendant was to pay the company's charges raised the presumption that the logs were held for him, on the other hand, the fact that the logs were to be scaled, to determine how much was to be paid, and no credit having been agreed on, reised the inference that payment was to be made before the purchaser was to be at liberty to remove the legs: Id.

The question of delivery was one of fact to be submitted to the jury,

and not to be decided for them by the court: .kl.

TRUST. See Amendment.

WAT.

Way of Necessity-Implied Reservation.- A party having conveyed a portion of his land over which was the only means of access to t sining had—Meld, that a right of way by necessity to the remaining od was recerved : Pingree v. HeDofte, 56 K. H.

WILL Boo Evidence.

THE

AMERICAN LAW REGISTER.

NOVEMBER 1876.

LIMITATIONS IMPOSED BY THE CONSTITUTION OF THE UNITED STATES ON THE TAXING POWERS OF THE STATES.

I. Impairing the Obligation of Contracts.—The provision prohibiting the states from passing "any law impairing the obligation of contracts," is found in the same paragraph with the prohibition against passing any bills of attainder, ex post facto laws, and laws granting titles of nobility: Coast. U. S., art. 1, § 10, par. 1. The questions affecting the taxing power of the states, arising under this provision, relate almost exclusively to the charters of corporations which contain clauses exempting them from taxation, and the effect of subsequent laws repealing those clauses and imposing taxes upon them. Whether the charter of a private corporation, or of a corporation not municipal, is a contract within the meaning of the Coastitution, was first settled by the Supreme Court of the United States in the celebrated Darkmonth College Case: Trustees of Dartmonth College v. Wood-

From a forthcoming treatise on Taxation, by Hon. W. H. Bunnowenn, of Norfolk, Va. It may be proper to state that some specific restrictions on taxation, such as Import and Tournage Duties, Regulation of Commerce, &c., are disasted in a reparate chapter —Eb. A. L. R.

ward, 4 Wheat. 519 (Cond U. S. 468), February 1819. The court had previously decided that a grant of lands by the legislature of a state was a contract; that the acts of a subsequent legislature could not divest rights acquired under the grant, and a repeal by such legislature was void: Fletcher v. Peck, 6 Cranch 164 (Cond. U. S. 828), February 1810. And shortly after they applied the principle to a case of exemption from taxation. legislature of New Jersey, in order to acquire title to an extensive tract of land held by the Indians, in consideration of a release of that title, agreed to purchase for them certain lands, which should not thereafter be subject to any tax. Subsequently these lands so purchased for the Indians were sold by them under a law passed for that purpose. The legislature then repealed that section of the act exempting the lands from taxation. The court held the first act a contract between the Indians and the state, and that the vendess of the Indians could not be divested of the right granted to the Indians, to be exempt as to this land from taxation without impairing the obligation of the contract: New Jersey v. Wilson, 7 Oranch 164 (Cond. U. S. 498), February 1812. doctrine of the Dertmouth College Case has been followed from that time, not only in the courts of the United States, but in all the state courts. Recently, the correctness of that decision has been seriously questioned, and it would seem to be clear from the history of the adoption of this provision of the Constitution, that it was only intended to apply to contracts between private individuals, to give the same protection to civil contracts against retrespective legislation as is given in the same paragraph to retrospective legislation as to crimes; that the provision against ex past facto laws and laws impairing the obligation of contracts, each refer to individual citizens of the states, and not to the states. This decision has been so long and universally acquiseced in that it comes within the principle of stare desisis, and will no doubt be adhered to even by those courts that are convinced that it is erroneous.

(a) Alienation of the Taxing Power.—The application of the principle of the Dartmouth College Case in connection with the taxing power of the state, while it has received the ascent of the majority of the judges in the Supreme Court of the United States, has been resisted most vigorously by the dissenting judges, and in many of the state courts it has been entirely repudiated. These cases hold that a charter of incorporation is a contract between the

state and the incorporators, and that if these charters contain a clause either exempting them entirely from taxation or for a definite period, a subsequent legislature cannot repeal those clauses of exemption; an attempt to do so impairs the obligation of the contract contained in the charter and is void; that a state legislature may make a contract with corporations as to the revenue of the state, and that such a contract is equally within the protection of the Federal Constitution, as contracts with reference to property: State Bank of Ohio v. Knoop, 16 How. 869 (Cond. U. S. 190); Home of the Friendless v. Rowse, 8 Wall. 480; Washington University v. Rouse, Id. 489; Washington Railroad v. Reid, 18 Id. 264; Humphrey v. Peques, 16 Id. 244; Jefferson Branch Bank v. Skelly, 1 Black 486, involving the construction of the same statute of Ohio as in 16 How. supra; McGee v. Mathias, 4 Many of the state courts have followed these decisions; others have steadily opposed them. The interests involved in this question are so great, the power of wealthy corporations who claim the benefit of this principle is so extensive, and the tendency of eminent legal critics to question the soundness of the views of the majority of the Supreme Court of the United States so plain (8 American Law Review 189; Sedgwick's Const. & Stat. Law, 2d ed. 587, n.), that it is appropriate to give, in some detail, the views of the dissenting judges and the dissenting state courts.

(b) Dissenting Views.—Those who dissent generally admit the doctrine that a state is bound by its contracts, and a legislature of a state, as to all matters within the purview of legislative power, may make contracts which are protected by this prevision of the Federal Constitution. But it is claimed that the power of taxation. is one of the severeign powers of the state, necessary to its continued existence, and that it was never contemplated, when the people through their constitutions delegated to their representatives in the legislature assembled the power to make laws for the good of the people of the state, that this grant of legislative power carried with it the right to barter away with private corporations one of the essential prerogatives of the government, the very lifeblood of the state: State Bank of Ohio v. Knoop, 16 Hew. 406 (Cond. U. S. 219), the able dissenting opinion of CAMPRELL, J. This case was really the first authoritative decicion on this subject: the case of New Jersey v. Wilson did not discuss the important

THE COESTITUTION

he alienated: 7 Cranch 164 (Cond. U. S. 498). The 1906 Ohio was decided at the December Term 1858; of the pine Judges on the bouch, three, CATRON, DANIEL, and CAMPRELL, cented, and TANET, C. J., while concurring in the judgment rendered, did not essent to the principles or responing contained in the epinion of the court as delivered by McLEAN, J.: 16 How. 398 (Cond. U. S. 207). At the same term of the court a case was decided from the same state, in which the court held that the legislation of the state did not amount to a contract, and in that case Judge TAXET gave his views upon the principle under discussion thus: "The powers of sovereighty con-**Sided to the legislative** body of a state are undoubtedly a trust committed to them to be executed to the best of their judgment for the public good; and no one legislature can, by its own act, disarm its successors of any of the powers or rights of sovereignty confided by the people to the legislative body, unless they are authorized to do so by the constitution under which they are elected. They cannot, therefore, by contract deprive a future legislature of the power of impesing any tax it may deem necessary for the public service; or of exercising any other act of severeighty con-Sied to the legislative body, unless the power to make such a contract is conferred upon them by the constitution of the state. And in every controversy on this subject, the question must depend on the constitution of the state, and the extent of power thereby conferred on the legislative body." He then examines the constitution of Ohio, and arrives at the conclusion that under the econstitution of 1802, and the decisions of the courts of that state, each power was given to the logislature of Ohio: Ohio Life Insurenes # Trust Co. v. Debelt, 16 How. 481 (Cond. U. S. 284). In the first case Judge TANKY refers to his opinion in the latter case for the reasons of his concurrence in the opinion of the majority of the court. Judge GRIER concurred entirely in these views of Judge TARET. From this examination of the views of Judge TARRY, it is evident that he did not yield his amont to the propeeitien that a general great of legislative power authorized one jugislature to alien the power of taxation so as to hind a subsequent legislature. He only claimed that the people, in their severeign capacity, speaking through their organic law, could delegate to the legislature such power. The subject was before the evert in 1861, the case involving the construction of the same

statute of Ohio just considered, and the ruling was the same. At the December Term 1869, it was again under consideration, the majority adhering to the ruling in 16 Howard, Judges MILLER and FIELD and C. J. CHASE dissenting. MILLER, J., says, " We do not believe that any legislative body, sitting under a state constitution of the usual character, has a right to sell, to give, or to bargain away for ever the taxing power of the state. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society. While undersuch forms of government, the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects; no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the state for ever of the power of taxation, is to held that they can destroy the government they are appointed to serve, and that their action in that regard is strictly lawful. The result of such a principle, under the growing tendency to special and partial legislation, would be to exempt the rich from taxation, and cast all the burden of the support of government, and the payment of its debts, on those who are too poor or too honest to purchase such immunity." Washington University v. Rowse, 8 Wall. 448-4. At the December Term 1871, the subject was again before the court, and the question was treated as ree adjudicate: Wilmington Railroad v. Reid, 18 Wall. 264. And so again at the December Term 1872, it was treated in the same manner: Humphreys v. Peques, 16 Wall. 244. This examination shows that the principle claimed to be decided, and which has governed the later cases, has really never received the assent of this tribunal. In New Jersey v. Wilson it was not even discussed; in State Bank of Ohio v. Knoop, three of the nine Judges dissented entirely from the opinion of the court, and two others, TANEY and GRIER (a host within ' themselves), discented from the reasoning of the court, and based their opinions of concurrence in the result of the opinion, upon a different principle, and fully agreed with the dimenting judges as to the principle that a general grant of legislative power did not authorize one legislature to alien the taxing power so so to bind subsequent legislatures. In their opinion such a power might be

granted by the constitution of the state and was granted by the constitution of Ohio.

(c) Dissenting Views of State Courts.-A number of cases were decided at the January Term 1858 of the Supreme Court of Ohio, arising upon the 60th section of the Banking Act of 1852, in which the view is taken and argued with great force, that a charter of incorporation is not a contract. The view of Burke as, to the charter of the East India Company, that it was a "charter to establish monopoly and create power," and not entitled to the protection of the various charters of English liberty, is approved; and the charters of incorporation granted by the state, were thought in a similar manner not to be entitled to the protection of the provision of the Constitution prohibiting the impairing the obligation . of contracts: Knowp v. The Piqua Bank, 1 Ohio N. S. 608; Tolodo Bank v. Bond, Id. 697; Debolt v. Ohio Life Inc. & Trust Co., Id. 568. These cases were reversed by the Supreme Court of the United States in 16 How. The question was before the Supreme Court of Ohio in Sandusky Bank v. Wilbor, 7 Ohio N. S. 481, when they adhered to their former opinion, claiming that, although precedent was against them, the cases did not convince their judgment and ought not to be followed. The courts of Maryland, Michigan, New Jersey, New Hampshire, Vermont, Pennsylvania, Connecticut, and North Carolina have taken similar views to the courts of Ohio: Mayor of Baltimore v. Balt. & Ohio Railroad Co., 8 Gill 289; East Saginaw Manf. Co. v. City of East Baginaw, 19 Mich. 259; State ex rel. fo. v. Mayor of Jersey City, **21** N. J. L. (2 Vroom) 575; *Broweler v. Hough*, 10 N. H. 148; Thorpe v. R. f B. Railroad Co., 27 Vt. 140; Mott v. Penna. Railroad Co., 80 Ponn. St. 9; Brainard v. Colchester, 81 Conn. 410; Releigh Reibroad Co. v. Roid, 64 N. C. 166. Beasley, C. J., in commenting on the proposition that a charter of incorporation is a contract, says " the entire contract on the part of the state, implied in such cases, is the supposed legislative agreement not to alter or recall the privilege granted. Ne other stipulation on the part of the state was ever suggested to exist, and it was the imagined existence of such stipulation alone which converted what clos, in all its essential qualities, as well as in its form, was an act of legislation, into a contract on the part of the community with the corporators. Without some such stipulation, having an obligatory force, I am wholly unable to conceive the ground of difference

between the charter of a corporation and any other act of legislation. If a statute lay no obligation on the state to do, or to refrain from doing, a particular thing, or one or more particular things, such enactment seems to me to be a pure act of legislation and in ne sense a contract:" 81 N. J. L. (2 Vreem) 580. And COOLEY, J., in reviewing the cases in the Supreme Court of the United States, from New Jersey v. Wilson, 7 Cranch, to McGes v. Mathias, 4 Wall., says, "It is not very clear that the Supreme Court of the United States has ever, at any time, expressly declared the right of a state to grant away the severeign power of taxation:" 19 Mich. 282, s. r. Iron City Bank v. Pittsburgh, 87 Penn. St. 804. The court in Pennsylvania say, "Revenue is essential to government as food to individuals; to sell it is to commit suicide:" 80 Penn. St. 9.

(d) Limitations on the Doctrine, that exemption from taxation in a charter is a Contract.—The courts which adhere to the doctrine have guarded it with many limitations. While, as a general rule, in the interpretation of a charter, the question is, what was the intention of the legislature, when applied to exemptions from taxation, it is said the intention must appear by clear, express and unequivocal words. The relinquishment of the power of taxation will never be presumed. Those who claim that it has been relinquished as to certain property or franchises, must show it by express grant, in explicit terms, not by implication, or doubtful intendment: Phila. & Wilmington Railroad Co. v. Maryland, 10 How. 898 (Cond. U. S. 427); Jefferson Branch Bank v. Skolly, 1 Black 447-8; Gilman v. Sheboygan, 2 Id. 518; Pacific Railroad Co. v. Case Co., 58 Mo. 17; North Mo. Raibroad et al. v. Maguire, 49 Mo. 490; Bisece v. Coulter, 18 Ark. 423. This rule of construction is universally received, and is applied so freely as sometimes almost to do away with the original doctrine. Where a bank was chartered and its charter was silent as to taxation, the power of the state to impose a tax on the benk after that time was sustained: Previdence Bank v. Billings, 4 Pet. 514 (Cond. U. S. 171). A reilroad was chartered to run through Penacylvania and other states; it was to pay a bonus to the state of \$10,000 annually, and the stock of the company, equal to the cost of construction, to be subject to taxation as other property of the kind in the state. Subsequently a general tax was haid by the state on all transportation companies. It was bold the relired was not

exempt from the general tax: Eris Railroad Co. v. Commonwealth, 66 Penn. St. 84; s. P. Bank of Easton v. Commonwealth, 10 Penn. St. (10 Barr) 442; Wanderer v. Lexington, 15 B. Monroe 258. In the first case, Sharswood, J., said: "It is not pretended that there is any express release of legislative power, but it is contended that, as the company have agreed to pay, and the state to accept, there seems, it is necessarily implied, that no more shall be exacted. So it might well be argued if any special taxation was imposed upon this company; for that would be to require an additional price beyond the terms of the contract. But the question, whether they shall be subject to a general tax upon all railroad and transportation companies in the Commonwealth, is an entirely different one." The principle is often illustrated by that of a person who buys land from the Commonwealth at a fixed price; it is implied that he shall not be called on to pay more, but not that his land . shall not be subject to taxation. So of the corporation, it is implied that the bonus paid for the franchise shall not be increased; but there is no implication that the property of the artificial person created by the charter shall not be subject to taxation as other property of the same kind in the state. But where the legislature have exercised the taxing power in a specified manner by a special tax on all the property of a corporation, and have intimated no design to subject it to further burdens, its property will be exempt from taxes imposed by general laws: N. Y. & Eris Railroad Co. v. *Bobin*, 28 Penn. St. 242.

A charter of a corporation contained a guaranty against repeal and alteration, but no grant against immunity from taxation. It claimed to be exempt from taxation, because it was not subject to taxation at the date of its charter, and a subsequent tax law was an alteration of their charter. It was held liable: St. Louis v. Beatmen's Ins. & Trust Co., 47 Mo. 156, the court using this language: "A law which seeks to deprive the legislature of the power to tax must be so clear, explicit and determinate, that there can be seither doubt nor controversy about its terms or the consideration which renders it binding. Every presumption will be made against its surrender, as the power was committed by the people to the government to be exercised and not to be alienated." The charter of a bank provides that its capital stock or profits shall not be taxed by any municipal corporation, without authority first had from the legislature; afterwards the legislature authorized

the town of Chester, in which bank was, to tax "all stocks of every kind." Bank was not liable to be taxed by the town; statute must be so construed as not to tax twice: Bank of Chester v. Chester, 10 Richard. (Law) 104.

The legislature of Missouri declared that upon payment of cortain fees, to go to the Insurance Department, by the insurance companies, the payment should be in lieu of all tuzes, fees and licenses whatever, collected for the benefit of the state, but remain subject to existing laws, as to county and municipal purposes. The Life Association of America owned property worth \$294,000; it had paid fees under this law amounting to \$150. The company claimed to be exempt from any further tax to the state, and it was attempted to be brought within the principle of Illinois Central Railroad v. McLean County, 17 Ill. 20, 80 Id. 140, where summe of money were paid and burdens assumed in lieu of all other taxes. But the court thought the claim was rather in the nature of an exemption, similar to City of Zanesville v. Richards, 5 Ohio 589, than a commutation. The intention to exempt the company not being clear, it was held liable for state taxes on its property: Life Association of America v. Board of Assessors of St. Louis Co., 49 Mo. 520; as to surrender of taxing power not presumed, see ziso Bank of St. Louis v. Manufacturers' Savings Bank, 49 Mo. 575. WAGNER, J.: "It is incredible that the legislature intended that taxes on hundreds of thousands of dollars, which may come into the hands of wealthy corporations, should be commuted for the yearly payment of \$150 or \$200 in official fees."

(e) No consideration for Exemption, it may be repealed.—It would seem proper, if the charter of incorporation is a centract, that the principles that apply to other contracts should apply to that. And should it appear that there was no consideration for the contract, it would be binding only during the pleasure of the parties to the contract. Accordingly we find that when the legionature of Pennsylvania, in 1888, enacted "that the real property, including ground-rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes," and in 1851 they enacted that all property belonging to corporations or associations should be taxed as other property, and repealed all laws exempting such property, it was a held the repeal was valid; the first act was not a contract, it was a

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epontaneous concession of the legislature, and no service or duty or other remunerative condition was imposed on the corporation. It is a privilege that from the nature of it exists bene placitum and may be revoked at the pleasure of the sovereign: Rector of Christ Church, Phila., v. County of Phila., 24 How. 800, Campbell, J.; Commonwealth v. Bird, 12 Mass. 442; Alexander v. Wallington, 2 Russ. & My. 85; People v. Com'r of Tuxes, 47 N. Y. 503-4.

Subsequent cases in the Supreme Court of the United States would seem to have overruled these authorities; the reasoning of the court certainly is in conflict with former cases. The legislature of Missouri, for the purpose of establishing a charitable institution, and enabling the parties engaged in it more fully and effectually to accomplish their laudable purpose, chartered the Home of the Friendless, and exempted its property from taxation. Subsequently a tax was imposed on its property. The tax was held void; the exemption in the charter was a contract: Home of the Friendless v. Rowse, 8 Wall. 480. The same principle was applied to a literary institution, chartered a few days after: Washington University v. Rouse, 8 Wall. 489. We are not disposed to question the authority of these cases; it may be that the benefit to accrue to the state, in having the unfortunate cared for by the corporation in the first case, and the benefit in the increased advantages of education secured to the people of the state, in the second case, are ample considerations to induce the legislature to grant to the corporators who should invest their money in the enterprise, a charter with the privilege of having its property exempt from taxation, and this privilege would be one of the franchises of the corporation. And in this sense, the language of DAVIS, J., in the first case, "that there is no necessity of looking for the consideration for a legislative contract outside the objects for which the corporation was created" (8 Wall. 487), is correct. But, as to his language in a subsequent part of the same opinion, that it has been -settled by repeated adjudications of that court that the legislature can grant away the power of taxation, "and that it is equally well settled that the exemption is presumed to be on sufficient consideration, and binds the state if the charter containing it is accepted" (8 Wall. 488), it is submitted is not only not supported by the authorities quoted by him, but was not required by the case under consideration, and is mere obiter dicta.

In New Jersey v. Wilson, 7 Cranch 164 (Cond. U. S. 498), the

consideration of an exemption was the cession of the Indian title to a valuable tract of land; the exemption was but a part of the purchase price of land ceded to the state. Gerden v. Appeal Tax Court, 8 Howard 188, was a bank charter, and the bonus paid the state was the consideration for granting a charter containing exemption from taxation. The cases in 16 How. and 18 How. (Piqua Bank v. Knoop, 16 How. 869; Ohio Life & Trust Co., Id. 416; Dodge v. Woolsey, 18 Id. 881; Mechanics' & Traders' Bank v. Thomas, Id. 884; Same v. Debok, Id. 880), were all cases under the Banking Act of Ohio, where a special tax was agreed to be paid by the corporators for their charter, which contained an exemption from all further taxation. McGes v. Mathias, 4 Wall. 148, was a case where the state owned lands subject to overflow, and in order to promote the drainage and sale of the lands, passed a law exempting them from taxation for ten years, and issued scrip receivable in payment for their lands; the exemption here was a part of the purchase price. No case has come under our observation where there was no consideration for the exemption, and it was made in the discretion of the legislature es a part of the policy of the state, deemed proper at the time as to the matter under consideration, that it has been held, the exemption was not repealable at the pleasure of the legislature. Where the legislature of Ohio in 1804 vested certain lands, set apart by Congress for a university in Ohio, in a corporation created for the purpose, authorized the lands to be rented out for the benefit of the university, and exempted their part from the payment of state taxes; in 1826, the corporation was authorized to sell the lands; these lands were held not to be exempt in the hands of purchasers: Armstrong v. The Treasurer of Athens Co., 16 Poters 281 (Cond. U. S. 299). The evident difference between this case and New Jessey v. Wilson, is that there was a consideration for the exemption in the latter case and none in the former. The cases just considered, with the exception of the last, are the cases relied upon by DAVIS, J., to sustain his dicts.

There are several cases in Connecticut, arising upon the Act of 1702, "That all such lands, tenements and hereditaments and other estates, that either formerly have been or hereafter shall be given and granted either by the General Assembly of this colony or by any town, village or particular person, for the maintenance of the ministry of the gospel in any part of this colony, &c., shall

LIMITATIONS IMPOSED BY THE CONSTITUTION

e exempted out of the general lists of estates and free from the payment of rates." This statute was re-enacted in 1821, leaving out the exemption clause. Lands had been given religious societies under the first act, and they had been leased to third parties, for a gross sum for 999 years, the benefit of the exemption was claimed by the lessees, the court held that the Act of 1702 was a contract between the state and the donors of the charity, which could not be repealed: Atwater v. Woodbridge, 6 Conn. 228; Osborne v. Humphrey, 7 Id. 885; Landen v. Litchfield, 11 Id. 251. In the latter case, the court was divided. In 1859 the legislature of this state passed a law in reference to these charitable donations, providing that when the society to whom they are given or may hereafter be given do not receive an annual income or rent from the real estate donated, or where the conveyance is intended to be a perpetual conveyance, the real estate so donated shall not be exempt from taxation. Land was devised to a religious society, it was leased for 999 years for a gross sum, no annual rent reserved. It was held the lease was in violation of Act of 1859 and void, and the case of Landen v. Litchfield, as to the unconstitutionality of Act of 1821 was disapproved: Brainerd v. Colchester, 81 Conn. 407. A religious society leased to a clergyman for 999 years in payment of his settlements, he devised to D. The exemption from taxation was claimed by D. reviewed all the former cases, overruled the cases in 6, 7, and 11 Conn., and approved the case in 81 Conn., holding that the Act of 1702 did not constitute a contract between the state and the denors or denoce of such charitable gifts as are enumerated in the statute, that the property donated should be for ever exempt, and that the act making such property taxable was void: Loud v. Town of Litchfield, 86 Conn. 116. CARPENTER, J., in his opinion asserts that in order to make such a contract binding, there must be a consideration: Ibid. p. 126. In Missouri, the courts hold that there must be an express contract upon a consideration deemed to be a part of the value of the grant or cliarter: State v. Dulle, 48 Mo. 282, following Lionberger v. Rowse, 48 Id., and Washington University v. Rowse, 42 Id. 808; the last two are the cases overruled in 8 Wall.

The case of Hardy v. Waltham, 7 Pick. 108, seems to be in conflict with the view presented; by act of the colonial legislature of Massachusetts, all lands, tenements and revenues of Harvard Col-

lege not exceeding in value 500L per annum, shall be thenceforth freed from all civil impositions, rates and taxes; it was held the lands acquired by the college before their income amounted to 500L were exempt from taxation even in the hands of a lesses. In this case, there had been no attempt by the legislature to repeal the exemption, but the assessors, supposing the exemption only applied to the property while in the hands of the college itself, had listed it for taxation. It will be seen from an examination of the case that this exemption was secured to the college by the constitution of the state, so that it would not have been within the power of the legislature to repeal the act granting the exemption. The weight of authority is undoubtedly in favor of the position, that a clause of exemption from taxation in a charter, or otherwise, in order to be classed as a contract where obligation cannot be impaired by its repeal or material modification, must be based upon a consideration deemed valuable or beneficial to the state: Cooley Const. Lim., 8d ed., p. 280, authorities in n. 8; Sedgwick Const. & Stat. Law 587, n.

In 1854, the state of New York passed a law exempting from taxation to the extent of \$500 property of persons who served in militia a period of seven years and had been honorably discharged. In 1865 the law was repealed. The repeal was held valid; the claim of exemption is not a right of property; the law passed by the legislature in relation to the militia of the state, granting the exemption claimed, was made in the exercise of the polices committed to the legislature to promote the interests of the state by such laws as seemed to them best calculated to obtain that end; from the very nature of it, a different policy might seem proper to a succeeding legislature, and the former law might be repealed: People v. Roper, \$5 N. Y. 629. PORTER, J.: "It is also true . that for an adequate consideration, and in the exercise of its general authority, it may invite investments in a particular description of property for the benefit of the state, by stipulating for its exemption, in the hands of the holders, from assessment as a subject of general taxation:" People v. Roper, 85 N. Y. 688, in which the cases in 16 Howard and 8 Howard, queted by DAVIS, J., in 8 Wall. 438, are referred to.

Similar to this was a law offering to all persons and to corporations to be formed for the purpose, a bounty of ten cents for every bushel of salt manufactured in the state from water obtained by boring in the state, and an exemption from tunction of all property used in the manufacture. The law was subsequently modified, limiting its operation to persons engaging in the manufacture prior to August 1st 1861, limiting the exemption to five years, and the amount of bounty money to one person to \$5000. The modification was held valid; the original act was not a contract by the state with persons engaging in the manufacture of salt; it was a law dictated by public policy and the general good, a bounty law, like the laws effering rewards for the killing of destructive animals; one that might be changed whenever the legislative body thought fit to change or modify its policy on the subject: Salt Co. v. East Segment, 18 Wall. 878.

W. H. Burnougus.

(To be continued.)

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

DANIEL WEBSTER .. CLARK W. UPTON, Assioner.

The transferes of stock on the books of an insurance company, on which the fall nominal value has not been paid, is liable for calls on the unpaid portion made during his ownership, without an express promise.

The capital stock of a business corporation is a trust fund for the protection of creditors, and neither stockholders nor directors can withhold or release any part of it from the claims of such creditors.

The stock in this sense is the whole stock, not merely the percentage of it called in or paid.

In error to the Circuit Court of the United States for the Northern District of Illinois.

The Great Western Insurance Company, of which the plaintiff below was the assignee in bankruptcy, was incorporated under the laws of Illinois in 1857, with general power to insure all kinds of property against both fire and marine losses. Subsequently to its organisation its capital was increased to more than one million of dollars, and it was sutherised by law further to increase its capital to \$5,000,000. It did not appear, however, from the record, that of the stock subscribed more than about \$222,000 was ever paid in, a sum equal to nearly twenty per cont. of the per value, leaving over \$965,000 of subscribed capital unpaid. In this condition the company went into bankruptcy in 1872, owing a very large sum, equal to if not greater than its entire subscribed capital, and Clark W. Upton, the plaintiff, became the assignee. The District Court then directed a call to be made for the eighty per cont. remaining

unpaid of the capital stock. A call was accordingly made, and · payments having been neglected, the assignee brought this suit against the defendant, averring that he was the holder of one hundred shares, of the par value of one hundred dollars each, and, as such, responsible for the eighty per cent. unpaid. On the trial evidence was given tending to show that one ---- IIale was the owner of a large amount of the stock of the company, for which he held the company's certificates, and that he had, through his brother, sold one hundred shares to the defendant, on which twenty per cent. had been paid. The books of the company. had been destroyed in the great fire in Chicago in 1871, but there was evidence tending to show that the defendant's name was on the stock ledger, and that the defendant transferred, er caused the stock bought from Hale to be transferred to himself on the books of the company. The district judge submitted to the jury to find whether the defendant actually thus became a stockholder, recognised as such on the books of the company, instructing them that if he did he was liable for the eighty per cent. unpaid as if he had been an original subscriber. A verdict and judgment having been recovered by the plaintiff, the case was removed by writ of error to the Circuit Court, where the judgment was affirmed, and the case came by writ of error to this court.

The opinion of the court was delivered by

STRONG, J.—The leading assignment of error here is that the court below erroneously ruled that an assignee of stock, or of a certifisate of stock in an insurance company, is liable for future calls or assessments without an agreement or promise to pay. This, however, is not a fair statement of what the court did rule. The court instructed the jury, in effect, that the transferes of stock on the books of an insurance company, on which only twenty per cent. of its nominal value has been paid, is liable for calls for the unpaid portion, made during his ownership, without proof of any express promise by him to pay such calls. This instruction, we think, was entirely correct. The capital stock of an incurance company, like that of any other business corporation, is a trust fund for the pretection of its creditors or those who deal with it. Neither the stockholders nor their agents, the directors, can rightfelly withhold my portion of the stock from the reach of these who have lawful claims against the company. And the stock thus hold in trust is

the whole stock, not merely that percentage of it which has been called in and paid. This has been decided so often that it has become a familiar doctrine. But what is it worth if there is no legal liability resting on the stockholders to pay the unpaid portion of their shares unless they have expressly promised to pay it? Stockholders become such in several ways: either by original subscription, or by assignment of prior holders, or by direct purchase from the company. An express promise is almost unknown, except in the case of an original subscription, and oftener than otherwise it is not made in that. The subscriber merely agrees to take stock. He does not expressly promise to pay for it. Practically, then, unless the ownership of such stock carries with it the legal duty of paying all legitimate calls made during the continuance of the ownership, the fund held in trust for creditors is only that portion of each chare which was paid prior to the organization of the company, in many cases not more than five per cent; in the present only twenty. Then the company commences business and incurs obligations, representing all the while to those who deal with it that its capital is the amount of stock taken, when in truth the fund which is held in trust for creditors is only that part of the stock which has been actually paid in. This cannot be. If it is, very many corporations make fraudulent representations daily to those . who give them credit. The Great Western Insurance Company reported to the auditor of public accounts, as required by law, that the amount of its capital stock outstanding (par value of shares . \$100 each) was \$1,188,000; that the amount of paid up capital stock was \$222,881.42, and that the amount of subscribed capital for which the subscribers or holders were liable was \$965,168.58. This report was made on the 10th of January 1871. Thus those who effected insurances with the company were assured that over one million of dollars were held as a trust fund to secure the company's payment of their policies. But if the subscribers and holders of the shares are not liable for the more than eighty per cent. unpaid, the representation was untrue. Persons assured have less than one-fifth the security that was promised them. This is not what the statutes authorizing the incorporation of the company contemplated. The stock was required to be not less than a given amount, though the company was authorized to commence business when five per cent. of that amount was paid in. Why fix a minimum amount of stock if all of it was not intended to be a security for those who obtained insurance? There is no conceivable reason for such a requirement, unless it be either to provide for the creditors a capital sufficient for their security, or to secure the stockholders themselves against the consequences of an inadequate capital. The plain object of the statute, therefore, would be defeated if there is no liability of the stockholder to pay the full prescribed amount of each share of his stock. With this plain object of the legislature in view it must be assumed, after the verdict of the jury, the defendant voluntarily became a stockholder. Either he must have designed to defeat the legislative intent, or he must have consented to carry it out. The former is not to be presumed. And if the latter was the fact, coming as he did into privity with the company, there is a necessary implication that he undertook to complete the payment of all that was unpaid of the shares he held whenever it should be demanded. To constitute a promise binding in law, no form of words is necessary. An implied promise is proved by circumstantial evidence—by proof of circumstances that show the party intended to assume an obligation. A party may assume an obligation by putting himself into a position which requires the performance of duties.

What we have said thus far is applicable to the case of an original subscriber to the stock, and equally to a transferes of the stock who has become such by transfer on the books of the company. There are, it is true, decisions of highly respectable courts to be found, in which it was held that even a subscriber to the engital stock of an incorporated company is not personally liable for calls, unless he has expressly promised to pay them, or unless the act of incorporation or some statute declares that he shall pay them, Buch was the decision of the Supreme Court of New York, reported in 17 Barbour 567, the case of the Fort Edward and Fort Miller Plank-road Company v. Payne. A similar ruling was made in The Kennebes and Portland Railroad Company v. Kondall, 31 Maine 470. A like ruling has also been made in Massachusetts. In most, if not all of these cases, it appeared that the law authorizing the incorporation of the companies had provided a remedy for non-payment of calls or assessments of the unneit portions of the stock taken. The company was authorized to declare. forfeited, or to cell the stock for default of the stockholder, and the You XXIV,--01

law having given such a remedy, it was held to be exclusive of any other. Yet in them all it was conceded that if the statute had declared the calls or assessments should be paid, an action of assumpeit might be maintained against the legal stockholder on a promise to pay, implied only from the legislative intent. Surely the legislative intent that the full value of the stock authorized and required to be subscribed, in other words, the entire capital, shall be in fact paid in when required, that it shall be real, and not merely nominal, is plain enough when the authority to exist as a corporation and to do business is given on condition that the capital subscribed shall not be less than a specified sum. A requisition that the subscribed stock shall not be less than one million of dollars, would be idle if the subscribers need pay only a first instalment on their subscriptions, for example, five per cent. Manifestly that would not be what the law intended, and if its intent was that the whole capital might be called in, it is difficult to see why a subscriber, knowing that intent and voluntarily becoming a subscriber, does not impliedly engage to pay in full for his shares, when payment is required. It is, however, unnecessary to discuss this question further, for it is settled by the judgment of this court. In Upton, Assignes of The Great Western Insurance Company v. Tribileock, decided at this term, we ruled that the original holders of the stock are liable for the unpaid balances at the suit of the assignee in bankruptcy, and that without any express promise to pay. The bankrupt corporation in that case was the same as in this.

But if the law implies a promise by the original holders or subscribers to pay the full par value, when it may be called, it follows that an assignee of the stock, when he has come into privity with the company, by having stock transferred to him on the company's books, is equally liable. The same reasons exist for implying a promise by him as exist for raising up a promise by his assignor. And such is the law, as laid down by the text-writers generally, and by many decisions of the courts: Bond v. The Susquehanna Bridge, 6 Har. & Johnson 128; Hall v. United States Insurance Company, 5 Gill 484; Railroad Company v. Boorman, 12 Conn. 580; Huddersfield Canal Co. v. Buckley, 7 Term 36. There are a very few cases, it must be admitted, in which it has been held that the purchaser of stock, partially paid, is not liable for calls made after his purchase. Those to which

we have been referred are Canal Co. v. Sansom, 1 Binney 70, where the question seems hardly to have been considered, the claim upon the transferee having been abondoned; and Palmer v. The Ridge Mining Company, 84 Penn. St. 288, which is rested upon Sensom's Case, and upon the fact that by the charter the company was authorized to forfeit the stock for non-payment of calls. We are also referred to Seymour v. Sturgess, 26 New York, 184, the circumstances of which were very peculiar. In neither of these cases was it brought to the attention of the court that the stock was a trust fund held for the protection of creditors in the first instance, a fund no part of which either the company, or its stockholders, was at liberty to withhold. They do not, we think, assert the doctrine which is generally accepted. In Angell & Ames on Corporations, sec. 584, it is said: "When an original subscriber to the stock of an incorporated company, who is se bound to pay the instalments on his subscription, from time to time as they are called in by the company, transfers his stock to another person, such other person is substituted not only to the rights, but to the obligations of the original subscriber, and he is bound to pay up the instalments called for after the transfer to The liability to pay the instalments is shifted from the outgoing to the incoming shareholder. A privity is created between the two by the assignments of the one and the acceptance of the other, and also between them and the corporation, for it would be abourd to say, upon general reasoning, that if the original subscribers have the power of assigning their shares, they should, after disposing of them, be liable to the burdens which are thrown upon the ewners of the stock." So in Redfield on Railways, ch. 9, sec. vii., pl. 4, it is said the cases agree that whenever the name of the vendee of shares is transferred to the register of shareholders, the vendor is exonerated, and the vendee becomes liable for calls. We think, therefore, the transferee of stock in an incorporated company is liable for calls made after he has been accepted by the company as a stockhelder, and his name has been registered on the stock books as a corporator; and being thus liable, there is an implied promise that he will pay calls made while he continues the owner.

All the cases agree that creditors of a corporation may compel payment of the stock subscribed, so far as it is necessary for the satisfaction of the debts due by the company. This results from the fact that the whole subscribed expital is a trust find for the

payment of creditors when the company becomes insolvent. From this it is a legitimate deduction that the stock cannot be released, that is, that the liabilities of the stockholders cannot be discharged by the company, to the injury of creditors, without payment. The fact, therefore, that in this case the certificate of stock taken by the defendant below was marked "non-assessable" is of no importance. The suit is brought by the assignee in bankruptcy, who represents ereditors, and, as against him, the company had no right to release the holders of the stock from the payment of the eighty per cent. unpaid.

The second assignment of error and the third are in substance that the pourt should not have admitted in evidence the order of the District Court directing a call by the assignee of the unpaid balance of the stock, and should not have ruled that the call made under the order was effective to make the liability of the defendant complete. That these assignments cannot be sustained was decided in Carver v. Upton, a case before us at this term. Nothing more need be said in reference to them.

The last assignment of anything that can be assigned for error is that the court charged the jury as follows: " The only question in, was the defendant a stockholder of the company? If the testimony satisfies you that the defendant purchased of —— Hale one hundred shares of this stock, and that it was transferred in the books of the company, either by Webster, the defendant, or by . Hale, who sold the stock, or by the direction of either of them, then the defendant is liable the same as if he had subscribed for the stock." The objection urged against this is that a transfer on the books directed by Hale, after the purchase by Webster, could not affect the latter's liability. But if Webster became the purchaser, it was his vendor's duty to make the transfer to him, where only a legal transfer could be made, namely, on the books of the company, and the purchase was in itself authority to the vendor to make the transfer. Still further it was Webster's duty to have the legal transfer made to relieve the vendor from liability to future calls. A court of equity will compel a transfered of stock to record the transfer, and to pay all calls after the transfer: 8 De Gez & Smale Ch. 310. If so it is clear that the vendor may himself request the transfer to be made, and that when it is made at his request, the buyer becomes responsible for subsequent calls. This, however, does not interfere with the right of one who

appears to be a stockholder on the books of a company to show that his name appears on the books without right, and without his authority.

The judgment of the Circuit Court is affirmed.

With regard to some of the questions involved or touched upon in the above opinion, in this country the decisions have been by no means uniform, and as the topic is of considerable interest it may be well to review the course of the law bearing upon some of the more salient points arising out of subscriptions to the stock of corporations, the means of enforcing the same, and the liability of subscribers and stockholders.

I. Whether the mere subscription to the stock of a corporation, or an agreement to take stock in the same, creates a personal liability to pay for the stock without an express promise to that effect.

II. Whether, where a remody by forfeiture or sale for non-payment of calls is given to the company, by statute or by-law, the company is confined to that remody.

In order to avoid repetition, these two points may be treated together, as in many cases we most them in company, and as in some of the cases the decision of the first has been deemed by some authorities to rest, to some extent at least, upon the existence of the power of forfeiture.

In Massachusetts, the leading case is The Andrew & Medford Turnpike Co. v. Good, 6 Mass. 46 (1809). The form of subscription was as follows: "Whereas the legislature has at the last session granted leave for making a turnpike read, " " we, the subscribers, desirtue of having the same completed as soon as possible, agree to take the said read, the number of shares set against our names, and he proprietors thereof." The act under which the company was incorporated gave the right of forfeiting the stock for non-payment of eatle. It did not to terms testrict the company to

that remedy. The defendant became delinquent. The company, waiving the forfeiture, brought assumptit for the unpaid assessment. It was held that the contract did not amount to a promise to pay for, but only to take charce, and that the right to forfalt having heat given by the legislature, it encluded by implication any other remedy; Pansout, C. J., remarking: " But it is a rule, founded in sound reason, that when a statute gives a new power, and at the some time provides the means of exceuting it, these who claim the power can execute it in no other way. When we find a power in the plaintiffs to make the assessments, they can enforce the payment in the method directed by the statute, and not otherwise, and that method is by the sale of the delinewest's shares."

This was followed by The New Bedford and Bridgepater Turipibe Co. V. Adame, 8 Mass. 138 (1811), wherein the court (Sanowicz, Sawala and PARKER, JJ.) said: "The general principle upon which they [the cases] all rest is, that where the pasty suches on express premies to pay the essentments he is snewerable. Where, ea the other hand, one, by subscribing the act of association, simply engages to become proprieter of a certain number of shares, without promising to pay assessments, then the only remedy which the corporation has in by sale of the theres to raise the sum assessed on them."

In The Franklin Glass Co. v. White, 14 Mass. 204 (1817), the act of incorporation permitted accomments and provided ferfebures. On the arguments there was a distinction attempted by councel between this and the foregoing eases, on the ground that the case before the court was that of a corporation
organized for private profit merely. The
court, however, overraied the distinction, and held that there was no personal
liability of the defendant to the corporation, though, under the Massachusette
law, in case of a defeiency of corporation assets, the stockholders were personally liable to answer an execution
against the company.

The above cases have been considered by same, amongst others by the late Chief Justice Expresso (Redfield on Railways, § 49), as resting upon the fact that in them the shares were given no par value, but were simply made Nable to assessments, and a line of cases, of which The Colot & West Springfield Bridge Co. v. Chapin, 6 Cash. 30, is an example, gives support to this idea, and viewed in, this light these cases are perhaps reconcilable with the current of authority elsewhere, but the court itself does not seem to have rested on that ground alone or principally in making its decisions, as appears from the words of Pancoura, C. J., in the first-monthough case, in which the learned judge seems to import the rule of strict construction of the criminal law into remedial civil legislation.

It is, however, admitted that a subexciption affords sufficient consideration for a premise to pay, when expressly made, and that in that case the more existence of a right of forfeiture will not deprive the company of the action of assumptit: Worester Turnpike Ca. v. Williard, 5 Mass. 90; Tuenton & South Boston Turnpike Ca. v. Whiting, 10 Mass. 881.

In New Hampshire, the same destrine has obtained, having been encounced in The Franklin Glass Co. v. Alexander, 2 N. H. 200 (1021), in which Woopners, J., remerked: "It is well sented that when an act of incorporation gives no empress temody against a member

for assessments, he is liable to no action for them by virtue of his membership."

In Maine, in the case of The Kennebee & Portland Railroad Co. v. Kondoll, 31 Me. 470 (1850), the subscription was simply for shares at \$100 per share. The charter gave the power to ordain and establish such by-laws "at shall from time to time be deemed necessary and proper, &c.; also, to make and calfect such assessments on the shares of the capital stock as may be deemed expedient, in such manner as shall be prescribed by their by-laws." A by-law was passed authorizing assessments and forfeiture for non-payment, and one holding the delinquent personally liable. Suspley, C. J., said: "When the language of a charter or statute does not in terms authorise the corporation to make a ball personally on a holder of stock, or impose upon him a personal obligation to pay, but authorises a collection by sale of the shares, the construction in this and in most of the other states has been that no personal obligation to pay was imposed."

It will be observed that in this, unlike the Massachusetts cases, there was a value affixed to the shares of stock, and a consequent limitation of liability, so that this is an uncompromising statement and enforcement of the doctrine of the exclusive remedy by forfolture.

These, it is believed, with a case to be hereafter noticed, are the principal cases in which it has been held that a special premise to pay for stock taken is necessary to render the subscriber, in the absence at least of a statutory enastment, liable in assumptit. The case of The Hariford & New Haven Ballrood Co. v. Kannely, 12 Com. 308 (1698), is a strong enganistics of the company provided for a sale of stock in case of delinquency. The defendant subscribed and paid a parties of the price of the stock; the subscription-list contained

no express promise to pay. On a failure to pay assessments, the company waived the forfeiture and such in assumpoit for the arrears. On the argument the Massachusetts and New Hampshire cases were brought to the notice of the court. HUNTINGDON, J., said: "It is true, a promise to pay in precise terms does not appear to have been made. The defendant has not affixed his sixnature to an instrument which contains the words I premise to pay, but he has done an equivalent act. He has contracted with the plaintiffs to become a member of their corporation, and to be interested in their stock to the extent of \$100 for each shere assigned him, if that amount be required. " " When, therefore, the subscribers associated under the act and became stockholders to effect this object, and which could be accomplished only by the advance of money in payment of the instalments, is seems difficult to give any other logal meaning to their act then that it was equivalent to an express promise to pay their respective proportions of the capital when lawfully demanded. Such a construction of their engagement hermonious with the entire design of their association, is in furtherance of its object, does no injustice to the stockbolders, and affords all the security, which can reasonably be required by the public or the creditors of the corporation, that the object will be concernmated and the debts of the company faithfully discharged." After noticing the Massachusetts eases, the learned judge spoke of the absence in them of an expressly given power to demand payment of accessments, and of the diseretion given to the companies to fix . the value of their stock, and continued : "We are not sure, however, that the highly respectable judicial tribunal which decided these cases was governed by any of the possilier electrostances, to which we have referred, nor will no confidently

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assert that the cases are not strongly analogous to or are distinguishable from the present case. If the court are to be understood as establishing and applying to all statutes in no sense penal, the position that, where a new power is given by a statute which also prescribes the mode of its execution, these who claim the power can exercise it in ne other way, we feel constrained to say, We cannot give to decisions founded on such a position the force of law in this state. * * * When a common-law remedy is not taken away by the statute which prescribes a new one, the latter is merely completive. A statute made in the affirmative, without any negative expressed or implied, does not take away the common law: Co. Litt. 113."

This case was followed by Ward v. Griswoldville Many?. Co., 16 Coun. 808 (1844), in which Warra, J., said: "What obligation did a stockholder assume upon himself when he subscribed for a share of the stock of this company? The answer obviously is that he agreed to pay the sum of \$100 in such instalments, and at such time, as shall be required by the directors."

In New York, the earliest case in which the question of the remody where a fugfeiture is permitted by statute arese, is Jenkins v. Union Turnpike Co., 1 Calpos 861, and 1 Calpes Cas. in error 86. (1804), wherein, though the case was ultimately decided against the company on another ground, LANSING, Ch. J., said, "This is an affirmative statute. It is a maxim of the common low that a statute made in the affirmative without any negative expressed or implied, doth not take away the common law. Therefore, the plaintiff may other have his remedy by the common less or upon the statute." L'Hommentou, Senator, who delivered the only other epinion, however, maintained the appendix, or as it may be salled; the Massachusette docIn Troy Turnpike and Railroad Co.
v. McChamry, 21 Wend. 226 (1839),
NELSON, Ch. J., said: "Ail the cases
from 1 Caines 381 to 14 Johns. 238,
show that the condition of forfeiture of
stack and all previous sums paid, for the
non-payment of any subsequent instalment, is but a cumulative remedy given
to the company. " " " It is true the
forfeiture clause is carried into the subscription papers. I cannot think that
this circumstance alters the case."

In The Fort Echward and Fort Miller Plank-road Co. v. Payer, 17 Barb. 569 (1854), the main question as to the effact of a stock subscription per se, was considered, HAND, P. J., saying: "I think the principle to be deduced from the decisions is that if the act of incorporation or any public statute declares the subscription to the stock or the proprister of the sheres shall pay calls made thereupon, or if he agrees to do . so, whether in the articles of association or other legal instrument, he is personally liable, even although the corporation has power to forfeit his stock for non-payment. * * * But where there is a right of forfeiture given, either by the not of corporation or by the terms of the subscription, but no absolute duty to pay is improved by statute, and there is no promise to pay, neither the subseriber to the stock nor the shareholder is personally liable to the corporation for cells." He then raised an implied promise from a prior article of association. This case was reversed, 15 N. Y. 303, on another ground, but no opinion was given by the Court of Appeals on the position taken by the court below on the subject of the subscription; but in The Haffalo and New York Railwag Co. v. Dulley 14 M. Y. 886 (1886). the question was fairly mot by the Court of Appenie, T. A. Jouvson, J., Adivesting the opinion, earling: "I am of opinion, therefore, that the agreement which the defendant subscribed is only

an agreement to take the stock of the corporation. But upon this undoubtedly the law raises an undertaking to pay the amount subscribed." It had been previously so held by a Supreme Court in Renne-lier and Washington Plank-road Co. v. Wetzel, 21 Barb. 56 (1855); see also Troy and Boston Railroad Co. v. Tibbets, 18 Barb. 297.

It is also beld that while the remedies of forfeiture and by action are camulative, yet a resort to the former will ber the latter, on the ground of a rescission of the original contract between the company and the subscriber: Buff. and N. Y. Hailway Co. v. Dudley, supra; Small v. Herkimer Manufacturing Co., 2 Conn. 330, reversing 21 Wond. 273.

The first question does not seem to have arisen fairly in Pennsylvania. In the first case there on the subject of subscription—Delaware Canal Co. v. Sansom, 1 Binney 70 (1803)—there was a power of forfeiture given by statute and a subscription paper headed as follows: "We * * * * promise to pay the sum of \$200 for every share of stock in the said company in such manner and proportions and at such times as shall be determined by the president and managers," &c. This was held a sufficient promise to bind the original subscriber; as to the remedy, it was held that the forfelture might be walved and suit brought for instalments. YEATES, J., however, Britt, J., concurring, intimated that an express promise was necessary to hold the subscriber, though an epiaton on that point was not called for in the phase accumed by the case. In Marriane Mising Co. v. Lovy, 4 P. Y. Smith 200 (1867), Brnoss, J., delivering the opinion of the court, showed a decided tendency to follow the case in 12 Conn.,. and his language would justify the syllabus, which is no follows: " By the not of subscribing to the aspital stock of an Incorporated association each associate undertakes to raise his proportion of

the capital as it may be called for by the directors." In Franks Oil Co. v. Me-Cleary, 13 P. F. Smith 319 (1969), however, Thompson, Ch. J., remark« on the foregoing case and reduces its offect to that of a more registration of the law of Michigan, as expounded by the Sapreme Court ; the case having arisen under a Michigan charter, although the language of Judge Strong would reem to take a broader range, and to be a species of precursor of his opinion in the principal case. We may, therefore, say that in Pennsylvania the question as to the personal liability of an original subscriber without a special promise, is unsettled, but that the law is, that forfeiture, where given, is a merely cumulative remedy and may be waived.

That forfeiture is a merely cumulative remedy to also held in Illinois: Klein v. Alten and Sangamon Reilroad Co., 13 Bl. 514 (1851); Peorie and Oquanka Railroad Co. v. Elting, 17 111. 429 (1886); in Mississippi: Fremen v. Winchester, 10 8m. & M. 577 (1848) ; in Michigan: Dester and Mason Plankroad Co. v. Millerd, 3 Mich. 91 (1984). In Michigan indeed the cases go even further, and after a sale of the stock, which safe has not brought enough to cover the arrears, allow assumpsit to be brought for the dedelency. See Carson v. Arctic Mining Co., 5 Mich. 200, in which a distinction is taken between a sale and a forfaiture.

III. The Hability of a transferres of stock for calls, made after he has besome a proprietor of stock.

Of sourse, in those states where an express premise to pay has been held necessary to held the original subscriber, in the absource of any duty imposed by statute, or declared thereby to arise out of the more ownership of shares, a forsier the transferree cannot be held in the absonce of a premise to pay on his part: Franklin Chase Co. v. Alexander, supre, is a fair statement of this view of the law.

In Connecticat, in The Marybrd and New Hoven Railroad Co. v. Baseman, 12 Conn. \$31 (1838), Hunganeway, J., said: "The reasons for our decision, subjecting the original subscribers to personal liability, apply with equal force to those who become stockholders by purchase. The relation of stockholder and company exists. A privity between them is established."

In New York, Moon v. Corrie, 9 Bark. 294 (1849), it is said: "If he became a holder by a transfer to him of the stock of an original subscriber, he at once adopted his contract and become substituted in his place, both as regards his rights and Habilities."

In Maryland, Bond v. Suspenhagne Bridge and Banking Co., 5 Her. & J. 126 (1828), the court said: "The charter authorising transfers and declaring all ' who may become the agreel proprietors of shares in the capital stock, either as subscribers for the same or as the legal representatives, successors or assigness of such subscribers," to be a body politic and corporate, accessarily creates a privity and raises an assumpsit, on the part of such as choose to become stockholders by accepting transfors, to pay all such cults as may be regularly made, on which an action will property lie."

This case follows very closely Lord Kerron's epinion in Budderyfold Connel Co. v. Buckley, 7 T. R. 86 (1796), wherein he said: "After the assignment the assignment hold the shares on the come conditions, and are subject to the same rules and orders as the original subscribers, and are to all luteres and purposes substituted in the place of the original subscribers."

In Proncytronia, in The Canel Co. v. Success, supra, Ynavas, J., said: "The thorse the defendant holds as trumsteres stand on a different ground; as to them be has given to approxy proteins to pay," and the set has made no other pro-

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vision than that the shares should be forfelted." The case was followed in Palmer v. Ridge Mining Co., 10 Casey 288 (1959), criticised in Merriman Mining Co. v. Lory, supers, but recognised as hinding authority in Franks Oil Co. v. McCorry, supers.

In The Mercines Mining Co. v. Bagley, 14 Mich. 501 (1866), the court said: "There is no principle of law which can establish any difference among stockholders in the duties which are implied from that relation. The very cosence of a corporation consists in its corporate succession, which, in stock companies, is kept up by the substitution of one owner for another in the proprietorship of shares."

The statement in Angel & Ames, sect. \$34, quoted in the opinion, as to the shifting of the burden from the outgoing subscriber to the incoming stockholder, so far as it relates to the relief of the former, is a little too broadly put, and is unsupported by some at least of the authorities cited in the foot-note. The Aylesbury Railway Co. v. Mount, & Sents N. R. 127, and The West Philadelphia Canal Co. v. Innis. 1 What. 198, were not actions against original subscribers; while in Coules v. Crampell. 25 Barb. 413, the bank had assented to the transfer. Brighm 7. Meed, 10 Allen 345, would seem to go the length of the text-book statement, but the report contains no very full statement of facts. On the other hand, there is antherity to the effect that in order to protest keels, the corporation has a right to refuse to release an original subsurfler by the acceptance of a new stockholder, until the stock is fully paid up. ' In Everhart v. The Philadelphia & West Chester Restroad Co., 4 Casey 889 (1887), the company refused to permit a transfer, and brought suit against the subscriber for arrears after the attempted assignment. In the Court of Common Pleas, HAINES, P. J., charged as folfowe: "A contract for the parchase of shares of the capital stock of a jointstock company, like other contracts of sale and purchase, is binding until performed or released by the concurring assent of the parties, and consequently a buyer of such stock cannot discharge himself of his liability to pay for it by a transfer of it to a third party, without the consent of the company," lie also held that the company could not arbitrarily withhold its assent, but only for cause. The verdict and judgment were for the company, which judgment was affirmed by the Supreme Court, though the judges differed on the grounds of affirmance. Woodward, J., mid: "On the next question, which relates to the right of the defendant to transfer his stock so as to escape liability for the unpaid instalment, we are a divided bench; but a majority concur, though for different reasons, in holding him linble, notwithstanding the transfer he made. Two of us think that he had a perfect legal right to assign on any terms he pleased, but that unless it was done with the assent of the company, he remained liable for the unpaid parties of his subscription. One of our number is of opinion that if the assignment had been bond fide it would have released him from further liability, but that the record showing it was male file he remains liable." Lawre, C. J., said: "Whether the transfer was fair or fraudulent, whether with the concent of the company or without it, whether entered on the backs or not, whether the purchaser become liable for the instalments unpaid or not, there is nothing in the law or in the nature of the transaction, which discharges the original subscriber from his express written engagements to pay the money."

In a similar case, decided in the fall of the same year, Pittsburgh & Steukewille Railroad Co. v. Clarke et al., 5 Casey 146, in the court below, Hampson, P. J., had rested upon the law as stated in Angel & Ames, seet. 584, and left to the jury the question of bone files only. The jury found for the defendants. The Supreme Court reversed the decision, laying down the broad rule: "Until the stock is fully paid up, the corporation has a right to refuse to receive new members in place of the original advanturer." This case was recognised and followed in Graff v. Pittidaryk & Strukewille Railrand Co., 7 Casey 488 (1858).

IV. As to the right of creditors, or officers representing them as an assignee in bankruptcy or a receiver, to compet the payment of unpaid subscriptions to stock. It may be promised that it is held that the insolvency of a company is no ground for restraining the collection of unpaid subscriptions or calls: West Chester & Philadelphia Rullroad Co. v. Thomas, 2 Phila. 344; Dill v. Wabank Valley Resilenced Co., 21 11.91, where the court said : "The inselvency of the company can constitute no ground for restraining the collection of these judgments [for calls]. Indeed it shows the more urgent reason why they should be collected. It is due to the oreditors of the company that it should make evailable all its resources and faithfully apply the proceeds to the payment of he dobte."

In Wood v. Danner, 3 Mason 300 (1894), Bronv, J., said: "It appears to me very clear, upon general principles, as well as the legislative intent, that the capital stock of benks is to be desired a piedge or a trust fund for the payment of the debts contracted by the bank."

Word v. Grisseldville Manufacturing Co., supre, was a hill fled by creditors to compel the company to make a call for supeld subscriptions. The bill was sustained, the court holding that the discretion of the directors as to making calls was "morely needs, relating to the time and manner of making the payments." That a creditor can compel the payment of an august subscription when the corporation is insolvent, is held in *Henry* v. Vermillion & Ashland Brilrand Co. and Suckleiders, 17 Ohio 187 (1848).

In Monn v. Pents, 3 N. Y. 422 (1830), the dectrine of a trust fund mentioned by Judge Stont, and so ably urged in the principal case, was recogniced. In Bankins v. Elliett, 14 N. Y. 877 (1837), the right of action for arrears in eally and subscriptions is said so rest with the receiver. Seymour 7. Surges, 26 N. Y. 134 (1862), altaiol to in the opinion, was a case of somewhat peculiar character. It was an action brought by a bond creditor to recever from a stockholder the amount still due upon his sharps, the corporation baving failed to meet its obligations. In the original bonds there was a special agreement, "the obligee and his assigns are to look only for payment of it to the corporation, and out of its fends and property." The bonds were not met and a new series was locaed. secured by a trust of the corporation fends and property. The by-laws gave the directors power to make calls to the par value, provided each call should be made by at least five directors, and gave the power of forfolture. The certificates enpressly rendered the stock "subject to a further payment of \$35 per chare." No call had been made. ALLEY, J., said: "The most that could be implied from a subscription to the capital stock, or an acceptance of a cortificate of steels. would be a premise to pay upon the request of the premises [the company]," and held, that there must be a call made by the five directors; without such a sall " the defendant could not be made ilable to pay to the corporation, • • • and if not to the corporation, then not to say one standing in the pince of the corporation, either by assignment, onecomion or not and operation of love." Later, the court ecencel to rest he decision on breader ground: "They besame stockholders by paying the amount
fixed by law or agreed upon with the
corporation, and taking certificates of
stock with a clause in them stating the
further payments to which the stock
might be subjected by order of the direstors, thus making the title of the
purchaser or stockholder a conditional
title under the by-laws depending on
the payment of the future calls, but
leaving such payment optional with
them." The opinion them goes on to
compare the liability to pay to a lien
on the stock.

It will be seen that the court lost eight of what seems to be the key of the subject, viz.: That subscribed capital is a trust fund for the procession of

the creditors of the corporation, in which view, while the fact that no call had been made by the five directors might be a valid defence in an action by the company, yet a creditor would stand on a different footing, and in regard to this case, which seems in conflict with the authority of cases in its own state, most lawyers would agree with Judge Strong that it does not "assert the doctrine which is generally accepted," and at any rate there would seem to be no doubt that an assignee in bankruptcy, who not only represents the creditors, but porcesses the powers of the corporation. so far as necessary to render available its assets, could collect the amount of on unpaid sum due upon the company's H. Budd, Ja.

Supreme Court Commission of Ohio.

WILLIAM H. GROGAN & EMMA G. GARRISON.

Under section two of the Dower Act (i S. & C. 516), an estate conveyed as jointure, to be a good legal or statutory bar to dower, must be such an estate, as to estately and kind, that the wife, on the death of her husband, may take possession of, and hold in severalty, and not in common with others.

If the estate so conveyed be such as that at common law dower could be assigned by meter and bounds, then in such case the jointers, to be a legal har to dower, should be an estate in severalty, so that the widow may enter and hold in severalty, without being compelled to resert to an action to have her jointure assigned to her by mette and bounds.

An automptial contract which conveys an andivided one-third part, or any other interest in common with others, in lies of dower, is not a good statutory bar.

Whether such an estate will constitute a good equitable jointure depends on the facts and circumstances of the case, and when such contract is pleaded by way of equitable defence to an action for dower, the facts upon which it depends, and not the pleader's conclusions from the facts, most be stated.

The conveyance of an estate as jointure, of an undivided one-third of a lot of land for the life of the wife, when such lot is less than one-third of the husband's lands, is print finit not a good equitable jointure, in the absence of facts showing that the same is fair and reasonable, or of such acts of the widow as amount to an estappel.

The autonoptical covenant of a woman, that in case she survive her husband she will not claim dower in his estate, cannot, in an action by her for dower, aparate to har such action, either by way of release or estoppel, where such aspenuptial contract does not constitute either a logal or equitable bur.

Error to the Superior Court of Cincinnati.

The defendant in error, Emma G. Garrison, formerly Emma Grogan, filed her petition for dower, stating therein that she was the widow of one William Grogan, who, during coverture, was seized of certain lands, out of which she asked an assignment of her dower as provided by law.

William H. Grogan, a minor, and the only con of the deceased, by a former marriage, and John Parker, administrator of William Grogan, were made defendants.

William H. Grogen, by his guardien, filed an amended answer, setting up as a bar to this action, an antemptial contract, a copy of which, by order of the court, was made part of the answer. It conveyed to Mrs. Grogen a lot "for her jointure, and in full set-infaction of her whole dower."

To this the petitioner demurred, on the ground that said amended answer did not state facts sufficient to constitute a defence.

Upon the issue thus made, the case was reserved for hearing to the general term, where it was held that the matters set up as a bar were insufficient, and decreed that the petitioner was entitled to dower.

This writ was brought to reverse that judgment.

Goodman & Storer, for plaintiffs in error:

I. The antenuptial contract is a good bar under the Dower Act, section 2; 1 S. & C. 518, 519.

II. The contract under consideration is a good bar at common law. For the definition and requisites for a good jointure, see Coke's Littleton, ch. 19, 86 a. And as to what Lord Coke meant by "competent," see Washburn on Real Property 299; 1 Atkinson on Conveyancing 266; 1 Bright on Husband & Wife 484; 1 Roper on Husband & Wife 462; Scribner on Dower 281; Drury v. Drury, 2 Eden 39; Id. 75; Walker v. Walker, 1 Ves. 6r. 84; Tinney v. Tinney, 8 Atkyn 8; Caruthere v. Caruthere, 4 Bro. Ch. 500; Smith v. Smith, 5 Ves. Jr. 189; Dybe v. Randall, 2 De Gez, MaN. & G. 209.

III. The contract is a bar at equity: Garthehore v. Chalic, 10 Yes. Jr. 1; Walker v. Walker, 1 Yes. Sr. 54; Harvey v. Ashley, 8 Atkyn 8; Easteourt v. Easteourt, 1 Cox 20; Tou v. Lord Winterton, 8 Bro. Ch. 498; Singrees v. Gutteredge, 1 Mad. 600;

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Supreme Court Commission of Ohio. WILLIAM H. GROGAN s. EMMA G. GARRISON.

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might be subjected by order of the directors, thus making the title of the
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title under the by-laws depending on
the payment of the future calls, but
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them." The opinion then goes on to
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interest in his estate, in full satisfaction of her claims as his widow; and on the 28d of February 1807, she freely and voluntarily entered into a written agreement to that effect, which was duly executed and acknowledged by both parties, whereby it was stipulated that said Grogan, in consideration of said marriage about to take place with plaintiff, whose name was then Emms Mitchell, did thereby grant, Largain, sell and convey to her, during her natural life, real estate in Cincinnati, described as follows:—

"All that lot of land, situate in said city, and being the one undivided one-third part of the southwest part of lot No. ten [10], in Ewing's subdivision, fronting ten [10] feet on Fifth street, and running ack on Kilgour street, on lines parallel with said street last named, one hundred and sixteen feet, nine inches [116] feet], said lot hereby conveyed being part of ground purchased by said city for the purpose of extending Kilgour street." It is averred that this land so conveyed was in full satisfaction of her dower. The parties were married February 24th 1867, and he died in August thereafter.

The answer concludes: "Wherefore, he denies that said petitioner is entitled to dower, as claimed in the petition, and asserts that adequate provision was made for her by the aforesaid jointure, and prays that her claim may be restricted to the premises set forth in the contract."

The prayer that her claim, which was to have dower in this ten feet as well as in the twenty-five feet in lot No. 9 adjoining, be restricted to the premises just described—that is, to the ten feet would seem to imply that the pleader understood this contract as embracing a life-estate in the undivided one-third of ten feet front by one hundred and sixteen feet deep, though, in argument, it is insisted that this description embraced all of the ten feet front, and not an undivided one-third. We do not so understand it. will of deceased is printed as part of the record. There is no statement of facts showing the extent and value of William Grogan's property at the date of the marriage, nor the value of the part conveyed, nor of that remaining, to enable the court to say whether it was adequate or not. There is no averment that the deed was ever delivered to her, or that she, either during or after coverture, ever had possession; on the contrary, the court finds, as one of the rescons doubtless for sustaining the domurror, that the promises

are in the possession of the defendant; and still more, that, by proceedings in the Probate Court, instituted, as they must have been, by the defendants, or one of them, the property had been sold and converted into money. We mention this as accounting for the absence of such important averments in this defence. Grogan died in August 1867, and this petition was filed in 1870, and the presumption is that, during the interval, this real estate, now set up as a jointure, was held and controlled by the heir, and, for aught that appears, she declined to accept the provision thus made. Was she bound to accept it? The petitioner declined to take under the will. The will refers to this antenuptial contract, and declares that "she shall not have any dower in my real estate described in the contract; " " that is to say, that said Emma Grogan shall have no dower in the real estate mentioned and described in said contract."

Let us imquire:

1. Was this antenuptial contract a legal bar to an action for dower? If it was, then this action was improperly brought. The Statute of Ohio, on this subject, reads:

"Sect. 2. If any estate shall be conveyed to a weman as jointure, in lieu of her dower, to take effect immediately after the death of her husband, and to continue during her life, such conveyance shall bar her right of dower.

"Bect. 4. That when any conveyance, intended to be in lieu of dower, shall, through any defect, fail to be a legal bar thereto, and the widow, availing herself of such defects, shall demand her dower, the estate and interest conveyed to such widow with intention to bar her dower, shall thereupon coase and determine."

What, then, is a jointure, under this statute? It is a word having a fixed legal signification, long prior to the enactment of our dower act. The section quoted is, in fact, but the adoption of a similar provision, found in stat. 27 Henry VIII, c. 1056, which enacted that where lands are settled to the use of the wife, "that then, in every such case, every woman having such jointure * * * shall not have title to any dower in the residue." This Act of Parliament was enacted to prevent a woman from having both dower and jointure. Before its passage, accepting a jointure was not a bar to her action for dower.

Under this statute, the word jointure had as definite and well-

made to the wife in satisfaction of dower. Sir EDWARD COKE says, "that to the making of a perfect jointure, within that statute, six things are to be observed:

- "1. It is to take effect for her life, in possession or profit, presently after the death of her husband.
 - "2. It must be for her own life, or for a greater estate.
 - " & It must be made to herself, and to no other for her.
- "4. It must be made in satisfaction of her whole dower, and not of part of her dower.
- "5. It must be expressed or averred to be in satisfaction of her dower.
 - "6. It may be made either before or after marriage."

He adds: "So as to comprehend all in a few words: a jointure " " is a competent livelihood of freehold for the wife, of lands or tenements, to take effect presently in possession or profit after decease of the husband; now, as dower ad ostium ecclesiae, or ex assesse patris, is better for the wife, because, in respect to certainty, she may enter, than dower at common law where she is driven to her action, and therefore Britton calleth dower ad estium ecclesiae and ex assesse patris, establishment of dower by the husband, and assignment of dower after his decease (for nothing that is uncertain is established); so jointure (that hath the force of a bar or dower by said Act of 27 Henry VIII.), is, as hath been said, more secure and safe for the wife than dower ad estium ecclesiae or ex assesse patris, for besides it is as certain as these others she may enter into it, after the death of her husband, and not be driven to her action:" Coke on Lit., sect. 41, note 8.

A jointure with all these qualities is binding on the widow, and a complete bar to her claim: 1 Cruise Digest, title 9, chap. 1, sect. 19. But it had to be as certain as dower ad cetium coclesic or excesses patris, and to be better than these; and, as Coke says, more secure and safe for the wife than either of these, or than dower at common law. It had to be established, so the wife could enter, after the death of her husband, and not be driven to her action. It is said jointure is to be as certain as dower ad estium coclesic or as assesses patris. How certain were they? Coke says: "Dowment ad octium coclesics is where a man of full age, select in fee-simple, who shall be married to a woman, and when he cometh to the church-door to be married, then after affiance and treth plighted between them, he endoweth the woman of his whole

land or the half or other lesser part thereof, and then openly deth declare the quantity and the certainty of the land which she shall have for her dower. Here be two things that the law doth delight in, viz.: To have this and the like openly done; second, to have certainty, which is the mother of quiet and repose, and this word (moiety), above said to be intended of the half in certainty, and not of the moiety in common, which clearly appeareth in that here Littleton saith the quantity and certainty of the land;" Coke on Lit., title Dower, sect. 89.

So dower ex assense patris must have the same quality of cor-It must be "of parcels of his father's lands or tenements with the ament of his father, who after assigns the quantity and parcels. In this case, after death of the son, the wife shall enter into the same parcel, without the assignment of any: Coke Lit., title Dower, sect 40. Jointure was as certain as dower ad setium ecolesia or ex assensu patris. It was more secure and safe then either of these. It was, like them, an establishment of dower by the husband, and better than either of these, she might enter into it, after the death of her husband, and not be driven to her This was doubtless for the reason that it was evidenced by a conveyance in writing. In Vernon's Case, 4 Coke 1, the leading one on the subject, it is said, "that dower ad cotium sociesia and ex assensu patris concluded the wife of her dower, if she entered into the land so assigned to her, after the death of her husband, for these being in such form as the law requires to be dowers in law, an assignment of dower, when the bushand was sole seised, cannot be made of the third or fourth part in common, but ought to be in severalty." 1 Thomas's Coke 597.

At common law it was imporative as a requisite of dower that the husband should be sole scised. Upon estates held in joint tenancy no dower would attach: Lit., sect. 45; 1 Scribner on Dower 257. So stringent was this rule, that where one joint tenant aliened his share, destroying the possibility of survivership and severing the tenancy, the widow of the aliener sould not claim dower: 4 Kent 87; Coke Lit., sect 81 5. The reason for this rule is obvious, and applies with equal force to a jointure. The sole seisin of the husband was indispensable, because only in such case could dower be assigned by motes and bounds, and as jointure was in lies of dower, the same qualities as to the estate granted necessarily existed. It must be so assigned as to be held in severalty

without an action at law. By the terms of our statute jointure must be an estate, conveyed as jointure. If from any defect it fail to be a legal ber to dower, and the widow elects to take advantage of this defect, and demands her dower, the estate conveyed as jointure shall cease and determine. In what sense, then, is this word jointure used? It was a term which, for more than two hundred years, had had a fixed legal signification. Long prior to the adoption of the Act of 27 Henry VIII. jointures were in common use, and their meaning well understood. That statute, from which ours is almost literally borrowed, has been carefully considered in many reported cases by the most profound jurists of England. The repeated discussions, and the long line of decisions, growing out · of this act, and similar ones in most of the states of the union, were doubtless familiar to our ancestors, who incorporated a like provision in the statutes of Ohio. They were men well versed in the common law, and especially that part relating to real estate. It is well established as a rule of interpretation, that where particular words or phrases have in law an acquired, fixed legal signification, and are thus incorporated into a statute, the legal presumption is that the legislature meant to use them in this legal sense: Turney v. Yooman, 14 Ohio 207. Where a statute speaks of a dood, it must be taken in its technical sense, as understood at common law-that is, a writing scaled and delivered by the parties: Moore's Lesses v. Vance, 1 Ohio 10. So, also, where the word mortgage is used, it will be assumed that it is used in its ordinary legal signification, as well understood at common law, and that the legal liabilities incident to it were understood to follow. Per 800Tt, J., Medical College v. Zeigler, 17 Ohio St. 52.

Guided by this rule of interpretation, and by the light of the authorities and decisions referred to, we are led to conclude that the estate to be conveyed as jointure must possess those prime requisites commerced by LATTLETON and COKE, which we have quoted—that there must be such an estate as the widow can enjoy in severalty. It must declare the "quantity and certainty" of the lands she shall have—the "two things that the law doth delight in"—first, to have it done under our statute, by a selemn deed of conveyance; and, second, to have "in certainty, which is the mether of quiet and repose." And Lord Coke adds, speaking of certainty in dower at the charch-door, and commenting on Lexyle-

TON'S text: "This word moiety means a half in certainty, not of moiety in common."

In Winch's Cases, p. 88 (London, 1657), it is said, to be a good jointure, a wife must have a sole estate, after the death of her husband. In the case at bar, the conveyance is fatally defective in this prime quality of certainty. It conveys an undivided one-third for life. The widow can not enter and enjoy in severalty; she would be driven to her action at law to have it assigned and set apart to her. One of the prime reasons for making a jointure was to give the wife the right, without her action, to enter and be sole possessor. Again, to constitute a good conveyance of an estate, the deed must not only be duly executed, but it must be delivered. We therefore hold that this antenuptial contract, for the reasons stated, is not a good statutory bar.

- II. The next inquiry is, was it good as an equitable jointure? What constitutes an equitable har is a question fruitful in decisions. Much learning and many conflicting decisions can be found in the books. The substance of all the decided cases is that any provision made before marriage, whether of lands and tenements, goods and chattels, or whatever description of property, that constitutes a valuable consideration, if fair, reasonable, and just, as between the parties, in view of all the circumstances of the case, at the time the contract was made, will, in equity, be supported as a good equitable jointure: Miller's Ez'r v. Miller, 16 Ohio St. 582; 2 Scrib. on Dower 885-401. Each case must be determined on its own particular facts and equities. Looking at all the facts disclosed by this answer, and the absence of averments, we have arrived at the conclusion that this contract is not, in equity, a bar. It conveys less than one-tenth of the real estate; no value is stated; it was only for life, in less than one-third of the whole; nothing was ever done to put her in possession; no acceptance by her, or part performance; and no facts stated to show that it was fair, reasonable, or just to her. It has been an axiom, accepted for ages, that dower was to be favored; that no widow should be berred of that ancient and cherished right, unless-
- 1. There was settled upon bor, in strict conformity to law, an cotate, as jointure, possessing all those requisites already pointed out; or,
- 2. There were such adequate provisions made, in lieu of dower, as, under all circumstances, was fair, reasonable, and just.

III. As to estoppel. Neither do we think the petitioner estepped. She has done no act during or since coverture, that amounts to an estoppel. Her antenuptial covenant to accept this conveyance in lieu of dower cannot have the effect to release her dower. In the case of Hastings v. Dickinson, 7 Mass. 155, the court says: "This leads as to the second ground, viz., that the defendant's covenant ought to have the effect of a release of dower. But this effect cannot be admitted on any correct legal principle. It is true that a covenant never to prosecute an existing demand shall exerate as a release to avoid circuity of action. But a release of a future demand not then in existence is void. Now in . this case, the settlement being executed before marriage, the demand of dower had no existence, the same being incheate." In the case of Vance v. Vance, 8 Shepley (Maine) 864, the court say: 44 There can be no estopped by executory covenants not to claim a right which is first to accrue afterward. The covenants of the wife with the husband before-marriage, that she will not claim dower in his cotate can not operate by way of release, estoppel, or rebutter to bar her of her dower."

The judgment of the Superior Court is therefore affirmed.

Scott, Chief Judge, DAY, WHITMAN and WRIGHT, JJ., concurred.

Supreme Court of Missouri.

MICHAEL HANNON BY AL D. THE COUNTY OF ST. LOUIS BY AL

The rule that counties, being political sub-divisions of the state, are not liable for the lockes or misconduct of their servants, has no application to a neglect of these obligations insurred by counties when special duties are assumed or imposed on them.

Thus, where the county of St. Louis made a contract for laying water-pipe to the county incame caylum, the work being done under the supervision of the county engineer, and while a trench was being dug in the grounds of the asylum, it caved in and killed one of the workmen, it was hold that the duty in which the county was engaged, was not one imposed by general law upon all counties, but a self-imposed one; that quend her the county was a private corporation, engaged in a private enterprise (more especially as the work was being done as its own property), and governed by the same raise as to its liability. In such case it is immetural, whether the performance of the work is voluntarily assumed in the first hattante, or is a special duty imposed by the legislature, and assented to by the county.

And municipal and quasi corporations are, under the above electrosteness, subject to the same destrict of Mahility.

ERROR to St. Louis Circuit Court.

The petition alleged that in September 1872, the county of St. Lonis entered into a written contract with Henry Luken, whereby the latter agreed to lay a water pipe from the main pipe, at the intersection of Lafayette and Grand avenues, along certain streets to the grounds of the County Insane Asylum, thence through those grounds to a connection with the cistern of the asylum, in order to supply the same with water; that the work was to be done to the satisfaction of the county engineer; was to be superintended by him, and that such precautions should be taken in the progress of the work, and in shoring such trenches as might be dug, in order to prevent accidents to life and limb, as the engineer should direct; that the width of the trench for the reception of the pipe was to be two and a half feet, and to vary in depth with the grade of the street; that the sides of the trench were to be shored with plank . and timber; that the county reserved to itself the superintending control over the work, and the right to discharge any workmen the contractor might employ; that in December 1872, the contractor had, in pursuance of the work, and under the direction of the engineer, dug on the grounds of the County Income Asylum, then owned by the county, a trench thirty feet in depth, and not excooding two and a half foot at the bottom; that by reason of this and of not being properly shored, the trench was dangerous, and known to be so by both the engineer and the contractor; that the minor son of plaintiff, Patrick Hannen, was in the employ of the contractor, engaged in laying the pipe along the bottom of the ditch, and, while the engineer was present, superintending and directing the work, the sides of the trench, without any fault or negligence on the part of Patrick Hannon, in consequence of the wrongful act, neglect and default of the engineer and of the contractor, in failing to properly shore the sides thereof, caved in and sufficiented the sen of plaintiff, &c.

A demurrer to this petition, on the ground that the "county is a political sub-division of the state of Missouri, and not a body corporate, either private or municipal, liable for the inches or missouriest of its servants or employees," was sustained by the Circuit Court.

Bakewell of Farish, for plaintiffs in error.—The case at bar is one in which the county was acting in a private capacity and was You. XXIV.—94

liable to the extent to which a private corporation would be: Lloyd v. Mayor of New York, 5 Seld. (N. Y.) 869; Eastman v. Meredith, 36 N. H. 292; Bayley v. Mayor of New York, 3 Hill 589; Mears v. Com. of Wilmington, 9 Ired. 78; Inhabitants Fourth School District of Rumford v. Wood, 13 Mass. 198; Theyer v. Boston, 19 Pick. 511; Akron v. M. County, 18 Ohio 229; Rhodes v. Cleveland, 10 Id. 159; Cunliffe v. Mayor of Albany, 2 Barb. 190; Larkin v. County of Saginaw, 11 Mich. 91; Kent's Com., vol. 2, p. 875; United States Bank v. Planters' Bank, 9 Wheat. 907; Conrad v. Villege of Ithaca, 16 N. Y. 172; Hickok v. Plattsburg, 16 Id. 161. In this case it is to be borne in mind that the party injured was working under the immediate direction and superintendence of a county officer: Dillon Mun. Corp., § 792, and cases eited.

Thomas C. Reynolds, County Attorney, for defendants in error, relied on Reardon v. St. Louis County, 86 Mo. 555; and referred to Dillon Mun. Corp., 2d ed. 1878, p. 872.

The opinion of the court was delivered by

SHERWOOD, J.—The case, as made by the pleadings, concedes the validity of the contract mentioned in the petition, and consequently that point is not open to discussion.

In the view we have taken of this case, it would be foreign, alike to our purposes and the facts admitted by the demurrer, to question the correctness of the proposition so generally concurred in eleewhere, asserted in Reardon v. St. Louis County, 36 Mo. 555, "that quasi corporations, created by the legislature for the purpases of public policy, are not responsible for the neglect of duties enjoined on them, unless the action is given by the statute." But as Mr. Justice METCALF, in Bigelow v. Randolph, 14 Gray 541, when speaking of the rule established in Mower v. Leioseter, 9 Mass. 247, that a private action cannot be maintained against a quest corporation for neglect of corporate duty, unless the action be given by the statute, very appropriately remarks: "This rule of law, however, is of limited application. It is applied in the cases of towns only, to the neglect or omission of a town to perform those duties which are impused on all towns without their corporate assent, and not to the neglect of those obligations which a town incurs when a special duty is imposed on it with its consent,

express or implied, or a special authority is conferred on it at its request. In the latter case a town is subject to the same liabilities for the neglect of those special duties to which private corporations would be if the same duties were imposed, or the same authority conferred on them, including their liability for the wrongful neglect, as well as the wrongful acts, of their officers and agents."

Towns in New England, as mentioned in the above extract, necupy the same place as counties, for, in Eastman v. Meredith, 86 N. II. 292, Perley, C.J., when referring to the former, says: "Towns are involuntary territorial and political divisions of the state, like counties established for purposes of government and municipal regulation." A similar definition is given of counties. Dillon Mun. Corp., vol. 1, § 10 a.

In the case at bar, the county of St. Louis was not engaged in the discharge of duties imposed alike by general law on all counties; duties whose performance, if neglected, might have been enforced by appropriate precedure for that purpose; but in the discharge of a self-imposed duty not enjoined by any law. And the test of the matter is this: that the county could not have been compelled to enter on the work for whose performance it contracted.

If the doctrine asserted in Bigelow v. Randolph, supra, be the correct one, and it has received the approval of Mr. Justice DILLOM, in his work on Corporations (vol. 2, § 762); and if, as before stated, the county undertook the contract of its own volition, and not in the observance of a public duty imposed by general law, then there is no refuge from this result: that the county, in regard to the performance of that contract, must occupy the same attitude as if a mere private corporation, and the work thus contracted for should be deemed a private enterprise, undertaken for its own local benefit; and this is more especially the case as the work, at the time of the occurrence which resulted in this action, was being done on its own property. And it certainly can make no difference, in point of principle, whether the "special duty is imposed with its consent, express or implied," or whether, as in the present case, it voluntarily assumed the performance of that which, if imposed by the legislature, and assented to by the county, would have become a special duty. For it is the element of concent which attaches civil liability, with its attendant consequences, to

the act done. In other words, as certain results flow from the acceptance by a quasi corporation of a special duty or a special authority, it is therefore the exercise alone of that volition which fixes its liability. Consequently, it must become quite immaterial whether the thing done, from which civil liability ensues, originates in the free act of the county in the first place, or whether it is legislative permission and its subsequent acceptance by the county, which gives origin to the act whose negligent performance produces the injury complained of.

Bailey v. The Mayer, fc., of the City of New York, 8 Hill 581, was a suit brought to recover damages against the city for an injury to plaintiff's land in Westchester county, occasioned by the breaking sway of a dam across Croton river, which dam, as well as the lands on which it was situated, was owned by the city.

It was alleged that the dam, which had been erected by certain water commissioners appointed by the state, for the purpose of introducing pure water into the city, was unskilfully built. plan for the work had been, under the Act of the Legislature, submitted to the voters for their approval or rejection. It was approved; and the enterprise, which included the building of the dam, was then in pursuance of the act, under the direction of the common council, prosecuted by the legislative commissioners at the expense of the city. The city was held liable; and those were the grounds on which Chief Justice NELSON, in a very able and exhaustive opinion, in which many authorities were cited and disexceed, held the liability to be based: 1. That the legislative grant was for the purpose of private advantage and emolument, though the public might derive a common benefit therefrom; the corporation quoad hos was to be regarded as a private company. 2. " By accepting the charter, the defendants thereby adopted the commissioners as their own agents to carry on the work; the acceptance was entirely voluntary, for the state could not enforce the grant upon the defendants against their will." 8. A municipal corporation, in its private character as the owner of land and bouses, is to be regarded in the same light as an individual, and dealt with accordingly.

The case finally went to the court for the correction of errors, where the judgment was affirmed: 2 Den. 488. There was some diversity of epinion in that court, as to the ground on which the affirmence should be placed, nineteen members of that court veting

therefor, against four for reversal; but only five of the number gave expression to their views in writing. The president of the senate gave an opinion for reversal. It may be very reasonably supposed, however, that those voting for affirmance did so on the same grounds as those stated in the opinion delivered. Senators Barlow and Bockie were for affirmance on the second ground stated by the Chief Justice, that the defendants had made the water commissioners their agents by adoption, but they did not question the correctness of the other grounds relied on by the Supreme Court, and in this view Senator Hand also concurred, as well as in the other views taken by the Chief Justice. Chanceller Walworzu based his vote for affirmance on the third ground given by the Chief Justice, though a careful perusal of his opinion will clearly show a substantial accord between his views and these of the Supreme Court, except as to the question of agency resulting from The opinion in that case, having been so thoroughly discussed and considered in two courts possessing appellate jurisdiction, is valuable as a precedent, and, notwithstanding subsequent criticism (Darlington v. Mayor, Ac., of New York, 4 Till. 164), has never been overruled: Lloyd v. Mayor, de., of New York, 1 Seld. 369.

I am fully aware of the distinction so generally taken by the authorities between the liability of municipal corporations on the one hand, and the non-liability of quest corporations under like circumstances on the other, though it has been very shrewdly observed in this connection, that "the courts have been much perplexed respecting the principle on which to rest the distinction:" Dill. Mun. Corp., § 764. But I think it may with safety be asserted, that the admitted facts of this case disclose no sound reason why any such distinction should be taken here, nor why the county, in respect to its own property, should not be held amenable to the same rules, as would certainly prevail were a municipal or private corporation, or an individual, a party defendant. Such is evidently the drift of the above cited cases, and such must be the evident and inevitable result, if that reasoning be pushed to its natural and logical conclusion.

Again, the legislature, by the Act approved February 8th 1879, recognised the County Lunatic Asylum as an existing fact, and provided that the county court might commit the income of that county to the county institution: Laws App. to St. Louis Co., p.

202. The legislature also, by an act approved April 1st 1872 (Id. 203), before the contract or work mentioned in the petition was made or entered upon, recited the fact that the asylam was built at the expense of the county, and appropriated \$15,000 annually in support of "the humane objects contemplated by its establishment," thus giving the whole matter legislative sanction and recognition. So that if it be urged that the argument is unsound which maintains that a self-imposed duty is tantamount to a special duty imposed, or a special authority conferred by legislative act, the ready reply is, that the acts of the legislature referred to bring the case fully within the principle applied by Mr. Justice Metcale, in Bigelow v. Randolph, supra.

This case is one of first impression in this state, and perhaps elsewhere; and if it goes beyond adjudicated cases, it certainly does not go beyond the principles which these cases enunciate.

Holding these views, the judgment should be reversed and the cause remanded.

Supreme Court of Wisconsin.

In as MOSNESS.

Atternoys should be recidents of the state in which they are licensed to practice. They are officers of the court and the mature of their office implies that they shall be residents and subject to the jurisdiction of the state and the court.

It is an insuperable objection to the general admission of any person to the har that he is a non-resident; but as a matter of courtery it is customary to permit non-resident lawyers to appear and conduct cases pro has vice only.

Morion for the admission to the bar of this court of Ole Mosness, a member of the bar of the state of Illinois.

The opinion of the court was delivered by

RYAN, C. J.—It is, we believe, the general practice of courts of record in the several states to permit gentlemen of the bar in other states to appear as counsel, on the trial or argument of causes. Such has been the uniform practice of this court. And, under all ordinary circumstances, it will always be a pleasure to us to permit members of the bar of other states to argue causes here, whosever they may appear here to do so. No license to practice here is necessary or proper for that perpose; the usual and proper practice being to grant leave, as gratis, for the occasion.

But general license to practise here as attorney and counsellor rests upon quite different considerations.

The bar is no unimportant part of the court, and its members are officers of the court: Thomas v. State, 22 Wis. 207; Cotteren v. Cormanghton, 24 Id. 184; see Bacon's Abr., Attorney, II.; 1 Tidd's Pr. 60; 8 Black 25; 1 Kent 806; Ex parte Garland, 4 Wall. 888. And if officers of the court, certainly in some sense officers of the state for which the court acts: Re Wood, Hopk. 6. This is not really denied in 20 Johns. 402, decided in the same year. And if it were, we have no doubt that the counsellors of a court, though not properly public officers, are quasi officers of the state, whose justice is administered by the court. The state may have extra-territorial officers, as commissioners to take acknowledgments. &c. But these are exceptions; and the general business of the state, within the state, executive, legislative and judicial, must be performed by citizens or denizens of the state, and the officers charged with it must be resident in the state: State v. Smith, 14 Wis. 497; State v. Murray, 28 Id. 96.

So the courts may have extra-territorial officers for extra-territorial functions, as commissioners to take depositions, &c. But for all functions within the jurisdiction of the courts, their officers must be residents of the state. This is essential to the nature of the functions themselves, and to the proper control of courts over their officers. The office of attorney and counsellor of the courts is one of great official trust and responsibility in the administration of justice; one liable to great abuse, and has always been exercised in all courts, proceeding according to the course of the common law, subject to strict oversight and summary power of the court. It would be an anomaly, dangerous to the safe administration of justice, that the office should be filled by persons residing beyond the jurisdiction of the court, and practically not subject to its authority. We take it that members of the bar of this state lose their right to practise here by removing from the state. After they become non-residents, they can appear in courts of this state ex gratia only. Our courts cannot have a non-resident bar.

This all appears to us to be so very plain that it is difficult to believe that chap. 50 of 1865 was intended to do more than to authorize the appearance here, as counsel in the trial and argument of causes, of gentlemen of the bar of other states. If in-

tended to do that it was probably unnecessary. If intended to do more, it was clearly without the power of the legislature.

For the reason only that the gentleman whose admission is moved is not a resident of the state, the motion must be denied.

Court of Appeals of Kentucky.

J. M. McARTHUR v. A. C. GODDIN at AL.

The full faith and credit required to be given to records of judicial proceedings in another state, means that such records shall have the same effect as records of home proceedings of like nature.

In actions on such records, the Statute of Limitations of the state where the actions are brought must govern. That statute is a plea to the remody and therefore to be governed by the les fori.

The statute of Kentucky bars any further proceeding on a judgment after fifteen years from the last execution thereon. An action in Kentucky cannot be maintained on an Ohio judgment upon which no execution had issued for more than fifteen years. Nor does it make any difference that within fifteen years the Ohio judgment has been revived in that state. Such reviver is simply a restoration of a lien, not a new judgment.

Ennon from Campbell Circuit Court.

In 1856, Brown, Goldin & Co. obtained a judgment in the Superior Court of Cincinnati against the appellant, J. M. McArthur, for \$3668,09. It was alleged in the original action that the notes evidencing the indebtedness had been lost. At the time this action was instituted and the judgment rendered, McArthur was a resident of the state of Kentucky, and has continued to reside here since. The service of process on him was acknowledged by an attorney, and an answer filed by the same attorney admitting the execution of the notes, that they were lost, and the indebtedness of the defendant to the plaintiffs as alleged.

No execution having issued on this judgment, the appellees, A. C. Goddin & Co., as surviving partners of Brown, Goddin & Co., on the 22d of September 1874, filed their petition in the court in which this judgment had been rendered, alleging the recovery, that the judgment remained uneatisfied, and asking that an order reviving it be entered for the amount due thereon. A summens having been executed on the appellant in this state, under the provisions of the Ohio statute, he appeared and resisted the motion to revive, alleging that he had no knowledge of the original judgment, or the pendency of the action in which it was obtained, until

he was served with process on the petition for revivor; that the entry of his appearance and filing of the answer by the attorney was without his authority or knowledge; denied any liability on the notes, &c. On the trial in the proceeding to revive the judgment, testimony was introduced to sustain the defence of the appellant, and upon the hearing in June 1875, it was adjudged, "that the judgment stand revived with interest and costs, and that the plaintiffs have their execution against the defendant for the sum of \$3725, his debt aforesaid, with interest at ten per cent. per annum from the 1st of March 1856."

In August 1875, the appellees, as surviving partners of the firm of Brown, Goddin & Co., instituted the present action in the Campbell Circuit Court, alleging the recovery under the proceedings to revive for the amount of the original judgment; that the defendant was served with process, and made defence; that the judgment was in full force unsatisfied, and they were entitled to recover, &c. A demurrer to this petition was overruled; an amended petition was, however, filed by the appellees, in which it is alleged that the judgment set up in the original petition was based on the judgment rendered on the 21st of March 1856; that this last-named judgment, under the statute of Ohio, becoming dormant, the same was revived by the judgment mentioned in the original petition, and the same was now in full force, and they were entitled to have and recover the full amount thereof from the defendant.

The appellant filed an answer to the petition as amended, in which it was alleged that the so-called judgment, dated the 5th of June 1875, was simply an order made under the statute of Ohio reviving the judgment of the Sist of March 1856; this statute reads: "If execution should not be sued out within five years from the date of any judgment that now is, or may hereafter be, rendered in any court of record in this state, or if five years shall have intervened between the date of the last execution usued on such judgment and the time of issuing out smother writ of execution thereon, such judgment shall become dermant, and shall cease to operate as a lien on the estate of the judgment-debter." That the judgment of the 21st of March 1856, constituting the only cause of action against appellant, was rendered more than fifteen years prior to the commencement of the present action, and Yos. XXIV.—68

he pleaded and relied on the Statute of Limitations in such cases made and provided in bar of the action, and further alleged that no execution was ever issued on the judgment of the 21st of March 1856, or that of the 5th of June 1875.

By the second paragraph of the answer, it was alleged that the judgment was obtained by fraud, and his appearance to the original action entered without his authority or knowledge. The third paragraph was to the effect that the order of revivor was still pending and undetermined, as he had appealed from the same.

The record of the original judgment, as well as the petition to revive, was made part of the pleading by appellant, from which it appeared that no execution could issue on the judgment, and that the proceeding to revive was to give vitality to the judgment, so as it might operate as a lien upon the estate of the debtor. A demurrer to each paragraph of the appellant's answer was sustained by the court, exceptions taken, and the appellant failing to plead further, a judgment was rendered against him, of which be now complains.

The opinion of the court was delivered by

PRYOR, J.—As to the third paragraph of the answer, we are disposed to adjudge that the remedy sought upon the judgment will not be denied the appellee, for the reason only that an action is pending upon the same judgment in another state. There is no allegation that the judgment has been superseded or annulled, and we must give to it the effect of a final judgment between the parties.

As to the second paragraph of the answer, conceding the statements therein contained to present a defence, it is sufficient to say the record discloses that the same defence was made upon the hearing to revive the judgment, proof taken, and the judgment revived. Such being the state of the record, the same matters cannot be relied on as a defence to the present action.

The Statute of Limitations in this state in actions upon judgments is, "that an action upon a judgment or decree of any court of this state, or of the United States, or of any state or territory thereof, the period to be computed from the date of the last execution thereon," &c., shall be commenced within aftern years after the cause of action first accrued.

It is meisted by counsel for the appelless that to sustain such a defence would be to violate that provision of the Federal Constitu-

tion which declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," and also the Act of Congress passed in 1790, declaring that "the records and judicial proceedings anthenticated as aforesaid shall have full faith and credit given to them in every court within the United States as they have by law or usage in the courts of the states from whence the records are or may be taken."

This court, in the case of Rogers v. Coleman, Hardin 415, held that the full faith and credit required by the Constitution and Act of Congress to be given to records abroad is just such as would be given them at home. The meaning of this is, that a judgment rendered by the court of a sister state having the jurisdiction will not be questioned on the merits, only in so far as it can be assailed in the court where the judgment was rendered.

It is equally as well established that the limitation law of the state where the remedy is sought, and not that where the parties may happen to live or the transaction entered into, must govern: Bennett v. Devlin, 17 B. Monroe 898; Graves v. Graves, 2 Bibb 207. In this state the lapse of fifteen years without issuing an execution will bar any further proceedings on the judgment, and where an execution issues on such a judgment, the court on motion will quash it: Lockhart v. Gieger, 2 Bush 231.

It is obvious that if the judgment of 1874 had been prosecuted in this state instead of the state of Ohio, the plea of the Statute of Limitations would have prevented a recovery, and to deny the efficacy of the plea in the present case would be to adjudge that the remedy to enforce the judgment in the state of Ohio had become a vested right in the appellees by reason of article 4 of section 1 of the Federal Constitution, and the Act of Congress made in parsuance thereof. Such a ruling would give the creditor, when the judgment was rendered in another state, a remedy denied to the citizen of Kentucky in attempting to enforce a judgment rendered in a home court. "The right to a particular remedy is not a vested right. As a general rule, every state has complete courted over the remedies which it offers to suiters in its courts:" Cooley's Const. Limit., 8d ed., p. 361.

In the case of McElmoyle v. Cohon, 18 Pet., it is said that the faith and credit to be given to such judgments is, " that they are record evidence of a debt or judgments of record, to be contested in such a way as judgments of record may be, or such as incuire

Again, "the Statute of Limitations is a plea to the remedy, and consequently, the lex fori must prevail." The question in the case cited was "whether the Statute of Limitations of Georgia could be pleaded to an action in that state, founded upon a judgment rendered in the state of South Carolina. The court entertained no doubt as to the right of the party to interpose such a defence, and that such action must be brought within the period prescribed by the lex fori, or the suit will be barred: Story's Condict of Laws, p. 726.

The attention of the court has been called to section 18 of article 4, chapter 71, of the General Statutes, which provides that where, by the laws of the state or country where the judgment was rendered, no action can be maintained upon it by reason of the lapse of time, or is incapable of being otherwise enforced there, no action upon the same can be maintained in this state.

This cannot be construed as a legislative interpretation of the principal point made in this case, or to dispense with the remedy afforded parties in the defence of such actions.

The same provision, by a subsequent section of the same statute, is made to apply to all causes of action arising in another state or country; if barred by the law of the state where the cause of action accrued, it constituted a defence under the statute if the party seeks to enforce his right in the courts of this state. To this extent the rule is qualified, and in the absence of any declaration of the legislative intention making the Statute of Limitations of other states apply in all cases where the cause of action accrued in such states, we are not disposed to overturn a principle too well settled at this day to admit of controversy.

The exception made by the statute indicates an intention to make no further innevation upon a wise rule of law calculated to prevent any confusion in the attempt to enforce such rights. As said by the Supreme Court, in the case already referred to, "the legislature of a state may fix different times for barring remedy upon judgments out of the state, and those rendered in its own tribunals. There is no direct constitutional inhibition upon the states, nor any clause in the constitution from which it can be even plausibly inferred that the states may not legislate upon the remedy in suits upon the judgment of other states, exclusive of all interference with their merits.

The remaining and most important inquiry is as to the effect of the proceeding of September 1874, to revive the judgment of the 21st of March 1856.

It seems that by the statute of Ohio, a judgmen. operates as a lien on the estate of the defendant, and upon a failure to have an execution for the period of five years from its rendition the lieu terminates until there is a revivor by which the dormant judgment is again vitalized, so that it may operate as a lien on the estate of the debtor. The mero order of revivor, by virtue of such a statute, constituted no cause of action, and is only a remedy afforded by which the original judgment may be enforced. So far as the record shows, no execution had been issued for near eighteen years from the date of the judgment; and if there had been no revivor necessary by the law of Ohio to create this lien, and the appellees entitied to their execution after the lapse of eighteen years, still, if an attempt was made to enforce the judgment in this state, although in full life in the state of Ohio, the limitation of fifteen years would operate as a complete bar to the recovery, and the more remedy afforded by the law of Ohio, under which the derment condition of the judgment is removed, so as to permit an execution to issue, cannot be said to be another judgment on the same claim, but is in fact only in aid of the original judgment. Such has been the construction of the statute by the courts of Ohio. "There is no new judgment recovered on the scire facias to revive a dormant judgment, but the old one is called into action:" Norton v. Beaver, 5 Ohio 178.

The order of revivor was simply restoring a lien that had been lost by reason of the failure on the part of the creditor to issue his execution. If this lien had continued in full force and effect during this whole period by the laws of Ohio, with the right to issue an execution at any time, it cannot affect the question as to the remedy when an attempt is made to enforce the judgment in this court, the judgment alone being the foundation of the action. After the lapse of lifteen years the remedy upon the judgment in the courts of this state was barred, and the order of reviver being in aid only of the judgment, or the means of enforcing it, does not take it out of the statute. Judgment is reversed, and cause remanded with directions to overrule the domurrer to the place of the Statute of Limitations, and for further precedings consistent with the opinion.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.²
SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.³
SUPREME COURT OF OHIO.³
SUPREME COURT OF VERNOUT.⁴

Admiralty.

Responsibility of Ship-owners.—Owners of ships appoint the master and employ the crew, and consequently are, as a general rule, held responsible for the conduct of both in the navigation of the vessel: Robert v. Propeller Galaton, &c., S. C. U. S. Oct. 1875.

Exceptions exist to that rule in certain cases, as where the craft is one without rails or steam apparatus, or where the difficulties of the navigation make it necessary to employ a steam-tug and to turn ever the control and navigation of the ship to the master and erew of the latter vessel: Id.

AGENT.

Authority of.—An agent was employed for buying goods for the principal, and selling them at the principal's store. Written articles of agreement between them stipulated that the principal would furnish empital, or anthorize the agent to obtain credit on the principal's name and responsibility, for the purchases of said goods, to an amount not exceeding \$4000; that all such purchases should be in the name of the principal, and should not exceed, in each down and on credit, the sum specified, unless by express consent of the principal; and that, acting within said limits, and to the extent of seid capital, in the legal and proper transactions of said business, the agent's acts should be binding on the principal. Held, that the agent was not authorized by said agreement to borrow money on the credit of the principal: Specier v. Thompson and Wife, 48 Vt.

And if money borrowed by the agent on the credit of the principal without authority, goes into the principal's business without the latter's knowledge, and the principal has the benefit thereof, yet the principal is not liable therefor to the person of whom it was borrowed, in the absence of a promise to pay: Id.

BANKBUPTOY.

Preference of the United States.—The United States is a preferred creditor as to the separate and individual assets of bankrupt partners: Lawis, Trustee, v. The United States, S. C. U. S. Oct. 1875.

The separate property of each partner is slike liable to execution with

¹ Proposed expressly for the American Law Register, from the original epiatons. The cases will probably be reported in 1 or 2 One.

^{*} From J. M. Shirley, Bog., Reporter; to appear in 56 New Hampshire Reports.

^{*} From E. L. Do Witt, Ecq., Reporter; to appear in 26 Ohio St. Reports.

⁴ From Men. J. W. Rowell, Reporter; to appear in 48 Vermont Reports.

the property of the partnership, and equity will not interfere upless

there are cogent special circumstances for it to do so: Id.

Where there are joint debtors and one is beyond the reach of the process of the court, and equity has jurisdiction, a decree may be taken against the other for the whole amount due: Id.

It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against '

the debtor : Id.

BILLS AND NOTES.

Alteration—Renewal—Discharge of Sureties.—Calhoua as principal, and Lucas and Blessing as his sureties, made their promissory note to a benk, and at its materity the bank agreed to give further time, if Calhoun would procure Boteler to sign the note in place of Blessing; thereupon Calhoun, with the consent of the bank, took the note to Boteler, and by falsely representing to him that Lucas had consected to the extension of time, procured Boteler to crase the name of Blessing and sign his own name in its place, and then redeliver the note to the bank, representing to the cashier that Lucas had agreed to the arrangement-Ilchi: 1. That this was equivalent to the making of a new note by Calhoun and Butcler, of like tenor and effect as the original. 2. That the surcties, Blessing and Lucas, were thereby discharged. S. That Calhoun, in procuring the name of Botelor; did not not as the agent of the bank, and, therefore, as between him and the bank, Boteler is bound by the note, notwithstanding the fraud of Calhoun: Farmers' and Traders' Bank v. Lucas, 26 Ohio St.

Defence by one of Joint Makers for benefit of all.—Where the makers of a promissory note are sued jointly, an answer by one of the defendants, actting up as a defence that the consideration of the note was illegal interest, incres to the benefit of all the defendants: Miller et al. v. Longuere et al., 28 Ohio St.

Where in such case there was a joint finding and judgment against all the defendants on the first trial, and they were allowed a second trial under the statute, the extent of their liability is the amount of the recovery on the second trial, notwithstanding the second trial proceeding may have been erroneously dismissed as to all except the defendant in whose name the answer was field: Id.

Guaranter by Endersement.—The payes of a negotiable preminery note, who, on transferring it to a third party, writes his name on the back and guarantees its payment at maturity, is a party to such note within the meaning of section 38 of the Code, and may be such jointly with the maker: Kautsman et al. v. Weirick et al., 26 Ohio St.

The liability of such party is, within the meaning of the section of the Code above referred to, substantially the same as that of an inderser

who has waived demand and notice: Id.

CONFEDERATE STATES.

Illegal Contract—Title.—Property purchased by the Confederate States during the war passed to the United States at the restoration of peace by copture: Whitfield v. The United States, S. C. U. S. Oct. 1878.

Contracts of sale made in aid of the rebellion will not be enforced by

the courts, but completed sales occupy a different position. As a general rule, the law leaves the parties to illegal contracts where it finds them, and effords relief to neither: Id.

CONTRACT.

Afternation and Subsequent Repudiation.—When one party to a contract insists upon annulling it, and brings suit for that purpose, and the other party thereto insists upon its validity and performance, and successfully defends upon the ground that it is valid and binding, such other party cannot, after the contract is thus established, and suit brought thereon to compel its performance on his part, defend on the ground of such attempted repudiation by the other party. His defence of the former suit would be a constant tender of performance on his part, and a waiver of any demand of performance, if any were necessary. And if such contract bear interest, such unsuccessful attempt at repudiation would not prevent the accruing of interest the while: Sumpson v. Warner, 48 Vt.

Time of Payment—Parol Evidence to Vary Legal Effect of Contract.
—When a contract signed by one party only is accepted by the other party, it becomes binding upon both parties, the same as if signed by both: Brandon Man. Co. v. Morse, 48 Vt.

A written contract for the sale and delivery of a certain quantity of wood at a stipulated price per cord, did not, in terms, fix the time of payment. Held, that the law fixed the time as on demand after delivery, and that the fact that the purchaser made voluntary payments to the vendor before delivery, did not vary the contract: Id.

Parol testimony is no more admissible to vary the clear and settled legal meaning and effect of a contract than it is to vary its terms. Thus, it was held incompotent to show by parol that at the time the above-mentioned contract was made the purchaser verbally agreed to pay for

said wood as it was delivered: Id.

CORPORATION.

Conditional Subscription to Stock.—A subscription to the capital stock of a railroad company on the condition that its railroad shall pass through a certain place becomes absolute on the location of the road through the place named: Manafold, &c., Railroad Co. v. Stout, 26 Ohio St.

Percer of Director to loan Money to Corporation.—While it is true that a director of a corporation is bound by all those rules of conscientions fairness which courts of equity have imposed as the guides for dealing or contracting with the corporation, yet it cannot be maintained that any of those rules forbide one director among several from leaning money to the corporation when the money is needed, and the transaction is open and otherwise free from blame: Oil Company v. Marbury, S. C. U. S. Out. 1875.

Perchasing in of Charco—Reduction of Capital.—An insolvent corporation council purchase in a portion of its capital stock: Currier v. Lebenon State Co., 56 N. H.

A corporation, whose capital stock as fixed and limited has not been fully paid in, cannot relieve a delinquent stockholder from payment of

assessments upon his stock by a purchase of the same, especially against the objection of another stockholder: Id.

A corporation cannot reduce its capital stock, under the previsions of ch. 184, sect. 6, Gen. Stata., by purchasing the shares of any stockholder. In order that such reduction may operate justly to all the stockholders, each stockholder should be allowed to surrender such preportion of his stock as the amount of the proposed reduction bears to the whole amount of capital stock: Id.

DEBTOR AND CREDITOR. See Husband and Wife.

Franchient Sales—Retaining Presents by Vender.—S., being ladebted to C. and D., sold to them certain entile and hay for 500, who indersed the amount upon a note held by them against S. The sale was made in the presence of a witness. The cattle and hay were left in the possession of S. to feed the hay to the cattle, also to his own new at his own expense; and it was agreed that the manuse made by the cattle should become the property of S. The oreditors of S. attached the cattle and hay as the property of S., and C. and D. replevied them. Upon the trial, these facts appearing, it was raised that the sale was void as to creditors, and that the facts furnished no sufficient explanation of the retaining the presention of the property by S.; and a verdict was ordered for the defendant. Iteld, that the rating was correct: Cattley v. Jackson, 56 N. II.

When the personal of chattels is retained by the render after an absolute sale, it is no sufficient explanation to show that the sale was made in the presence of a witness, where it was not attended with such publicity as would naturally give notoriety to the transaction, and when there was no change in the personal or use of the chattels to indicate that any change in the ownership had taken place: M.

Deser

Construction of Grant.—In a warranty deed of land was the following clause: "Also conveying the right to draw water from any and all the springs on said Clement's (the granter's) land, easterly and above the afbreakid described premises, with the right to conduct the same by aqueduct to said premises, for all uses or purposes for ever." Abd, that the grantes was entitled to take all the water from the oprings, provided the same was in good faith required for use on the granted premises a Mesonson v. Wiggin, 80 N. H.

DRAFT.

Bill of Loding—Conditional Delivery.—M. & Co. having purchased wheat at Milwankee and paid for it with their own money, eminipped to the conhier of the Milwankee bank and handed ever to that have the blik of leding as a recurity for the drafts drawn against it—drafts which the bank purchased. M. & Co. also sent involves to fi. & Co., who they expected would purchase the wheat. The Milwankee hank sent the drafts with the bills of lading attached to the Merchants' Book, Watertown, accompanied with the most positive instructions, by letter and by indersement on the bills, to held the wheat until the drafts were paid. Subsequently, the Merchants' Book sent orders to the mesters of the

earrying vessels to deliver it to the "Corn Exchange Elevator, Oswege, N. Y.," of which S. & Co. were the proprietors, and at the same time sent letters to S. & Co., containing clear instructions to hold the wheat and "deliver" it only on payment of the drafts. S. & Co., however, shipped it to the defendants, who received it and converted it to their own use. In an action brought by the bank of Milwankee, Held, that the ownership of the wheat never passed out of the plaintiffs, and that the defendants were liable for its conversion: Donos et al. v. The National Exchange Bank of Milwankee, S. C. U. S. Oct. 1875.

EVIDENCE. See Contract.

Nitnemes upon the Question of Insanity—Life Insurance.—In assumptit upon a life insurance policy containing a proviso that the policy should be void if the assured committed suicide, the question was whether the assured was insane at the time he killed himself. It was held that his physician, who was consulted by him two or three weeks before his death, might testify to declarations then made by him, that, "at times he felt as if he must take his life—that he had as impulse to take his life," such declarations being directly in the line of inquiry that the physician would naturally make to ascertain the then present condition of his patient, and material to that end, and important as tending to show the nature and extent of the discuss he was called upon to treat:

Hathauxay's Adm'r v. National Life Ins. Co., 48 Vt.

The opinion of persons not experts, upon the question of innanity, is admissible in this state, when based upon facts within their own knowledge and observation to which they have testified; and the fact that such persons did not form their opinion at the time they saw and observed the facts testified to by them does not render their opinion inadmissible: Id.

The principle is well settled that physicians and surgeous of practice and experience are experts; and that their opinions are admissible in evidence upon questions that are strictly and legitimately embraced in their profession and practice; and it is not necessary that a witness of this class should have made the particular disease involved in the inquiry a speciality, in order to make his textimony admissible as an expert: Irl.

Hypothetical questions may be put to medical experts, if the testimony tends to establish every supposed fact embraced therein. Nor are answers to such questions objectionable because they include considerations not referred to in the questions, as constituting the basis of the opinion given, and such as the testimony tends to prove and as might properly have been included in the questions: Id.

FOREIGN JUDGMENTS.

Judgment Rendered in one State open to Inquiry in another—Partnership Sued after Dissolution—One l'artner not Served.—The jurisdiction of a foreign court over the person or subject-matter embraced in the judgment or decree of such court is always open to inquiry, and in this respect the court of another state is to be regarded as a foreign court: Hall et al. v. Lanning et al., S. U. U. S. Oct. 1875.

A member of a nartnership firm, residing in one state, cannot be res-

dered personally liable in a suit brought in another state against him and his co-partners, although the latter be duly served with process, and although the law of the state where the suit is brought authorises judgment to be rendered against him: Id.

Nor can his co-partners, after a dissolution of the pertnership, without his consent and authority, implicate him is suite brought against

the firm by voluntarily entering an appearance for him: Id.

FRAUDS, STATUTE OF.

Parol Agreement to Courty Land.—The plaintiff being indebted to H. L. G., husband of the defendant, enuveyed to him certain real estate, with the parol agreement that he would reconvey to the plaintiff upon payment of the debt. H. L. G. died without having reconveyed the premises. After his death, the plaintiff, for the purpose of restoring the legal title to himself, entered into a perol agreement with the administrator of the decenned and with the defendant, by the terms of which he was to be allowed a debt of \$4042.16 against the estate of the deceased; the administrator was to obtain license and sell the premises. The plaintiff was to bid off the same at \$5000, being the amount allowed the plaintiff against the estate, with \$957.84 more still due from the pleintiff, according to the parel contract for a recouveyance; and the defendant at the same time agreed by parel to convey her right of dower to the plaintiff. The administrator obtained license. and sold the premises to the plaintiff for \$5000, who said \$957.84 to the administrator (being the difference between \$5000 and \$4042.16), and received from him a deed of the premises. The administrator accounted for said sum as assets belonging to the estate. The defendaut refused to convey her right of dower to the plaintiff, but demanded and caused the same to be set out to her. The plaintiff brought this suit to recover one third part of said sum of \$5000. Hold, that the plaintiff could not recover: Gardon v. Gordon, 56 N. H.

GOVERNMENT.

Powers of Government de facto.—A government de facto, in Erm possension of any sountry, is sluthed while it exists with the same rights, powers, and duties, both at home and abroad, as a government de jure: Phillips v. Payne, S. C. U. S. Oct. 1878.

For certain purposes the states of the Union are regarded as foreign

to each other: Id.

The state of Virginia is de facto in possession of the enunty of Alexandria, and her title has been undisputed since she resumed possession under the Act of Congress of July 9th 1846. The United States has no power, therefore, to consider the legislation of Virginia in reference to the county of Alexandria as void and of ne effect: Id.

GUARANTER.

Frand—Delivery of Articles to Third Person.—In an action for the price of goods alloged to have been sold by the plaintiff to the defendant, and delivered to a third person in accordance with the terms of a written instrument signed by the defendant, purporting to be a contract of sale, it is not necessary, in order to defect the action on the ground of fraud, to allogs or prove that the goods were returned or effect to

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be returned upon the discovery of the fraud, where it is shown that the goods were so delivered by the plaintiff without the authority of the defendant, and that the defendant signed the instrument in ignorance of its contents, on the false representation of the plaintiff that it was a more recommendation of the goods described therein: Martindale et al. v. Harrie, 26 Ohio St.

Such instrument in the hands of an assignce is subject to the same defences that might be made to it in the hands of the person to whom

14 was delivered: Id.

HUSBAND AND WIFE.

Gift by Insolvent to his Wife.—An insolvent debtor purchased real entate for his wife, taking the title in her name, and an a gift to her advanced and paid \$3460 of the purchase-money and cost of the preperty, the wife paying the behance, which was \$4000. On a bill field by a creditor of the husband, to subject the property to the payment of a debt of less than \$2460, the court ordered the property to be sold, and that twenty-four hundred and sixty sixty-four hundred and sixtieths of the proceeds of sale be applied in payment of the debt. Ifold, that this decree was not erroneous to the projudice of the wife, and that she was not entitled to be first paid her \$4000 out of the proceeds: Shapfer v. Ithhian, Jones & Co., 25 Ohio St.

ERSANITY. See Evidence; Insurance.

INSOLVENT. See Husband and Wife.

INSURANCE

Avoidance of Policy by Suicide—Instally.—Instally short of delisium or fronzy whereby all power of solf-will and control is lost, will excuse the set of suicide, and prevent the avoidance of a life insurance policy containing a provise that it shall become void if the assured commits suicide: Italhaway's Adm'r v. National Life Inc. Co., 48 Vs.

In assumptit upon a policy containing such a provine, the court charged the jury, that "if the assured had sufficient mind, reason and judgment to rationally consider and determine whether he preferred to die or to live, and, for any reason, determined that he preferred to die, and is pursuance of that determination, contemplating what he was doing, he took his own life, no recovery could be had upon the policy; that it was not enough to entitle a recovery, that at the time he took his life his mind was uncound to nome extent, nor that it was no uncound that he could not distinguish right from wrong, but that it must have been so wasound that it could be seen that the unsaundness killed him; but that if his mind, reason and judgment became impaired, and an insece idea that he must take his own life entered his mind, and got hold of it, and his mind, reason and judgment grow weaker, and that idea stronger, until his mind was overturned, and the idea got control of his reasoning faculties and of him to that extent that be could not recent it, but was compelled to and did yield to it and take his life was taken, although his mind contrived the means by which his life was taken, and his physical strongth carried them out and took it—in reality this insece idea or impulse, and not his mind and will, took his life—

the philatiff was entitled to recover." Abdd, that the charge was a as favorable to defendant as the law allowed a M.

Condition against Allenation.- A policy of insurance which contains a condition that the insured property shall not be altenuted or onagashered, may be avoided by the Incarer Where a mie or ensumbranes is affected without his consent, although it is stipulated in the pothat exceed to an analyzment of the policy will be given by the in-seror if requested within a sertain time after sale of the incured pra-porty. Such stipulation blade the incurer to concent to an assignment of the policy to the purchaser only in some his concent has been given

to the sale of the property: Hone Ins. Ch. v. Lindry et al., 26 Ohio St. In an action on a policy of incorrence which contains a condition that, in case of loss, proof of the loss shall be made and delivered to the loss server within thirty days after the loss occurred, the petition, which does not allege performance of rech condition, or a walver on the part of the

leaver, is but on demorrer : M.

LANDLORD AND THIANG.

Comment to Pay Rent-Abbure of Property by the Obited Butes-Where A. leased certain premises to R. for the period of five year from October 1st 1900, at the rest of \$6000 per aureum, pepalis I monthly instalments, and the property was seized by the willtery at therities of the United States on Ray 1st 1905, as absorbed property and the leases was compelled to pay rest to those willtery authorities Risk, that A. sould not recover rest for R.'s personales of the premise for the time during which he was obliged to pay rout to the militar authorities of the United States t Marrites v. Mor. Massacrin, S. C. R. One, 1875. U. S. Oat. 1875.

MILL DATE

MW Art of 1806—Duty of Committee.—By the MW Act of 1000 is seems that the mill-owner may clost to what height he will raise th water on the hard of riperion owners above; and the assessment of demogra by the seemmittee should be used upon the basis of such the tion : Tours v. Faulbeer, 36 N. H.

A will-down in a common and courselest instrum measure and describe the extent of a water-right; but such right to be defined and limited by any other appropriate measurest on the ground

A mill-owner erected a data with the capacity of raising the wet beyond his existing right, but provided with gates, do., whereby he say pered it to be within his power to keep the water within the finite of he right; and it was always his intention so to manage the dam and gates not to everytop his right, until he estaid arrange by content with the evenery of land above Rabis to be flowed. On a politice brought he land-owner, under the set, it was held, that the notant interference with the water, and not such interference as was nandered manifely in the height of the dam, was the proper bests for the as

The committee, in such cases, should fix some pulsable god procument on the ground, to much the Built of the right w

pass by virtue of the proceedings; and such monument should be carefully and accurately described in their report: Id.

MUNICIPAL CORPORATION.

Assessment for Street Improvements—Partial Completion of the Work.

—For the purpose of connecting two public thoroughfaces, a street improvement was ordered, which was to be paid for by assessment on the owners of the abutting property. After the work had been completed part of the way, it was suspended or abandoned, leaving a part of the proposed street wholly unopened. Ifrid, that an assessment for the work already done was premature and unauthorized: Cincinnati for the use of Wirth v. Cincinnati and Spring Grove Assesse Co., 26 Ohio St.

Preserve of.—Counties, cities and towns are municipal corporations, exceed by the authority of the legislature, and they derive all their powers from the source of their creation, except where the countitation of the state otherwise provides: County Commissioners v. County Commissioners et al., S. O. U. S. Oct. 1875.

Dicision of.—If a part of the territory and inhabitants of a municipal corporation are reperated from it, by nanexation to another or by the erection of a new corporation, the former corporation still retains all its property, powers, rights and privileges, and remains subject to all its obligations and duties, unless some new provision should be made by the ast authorising the separation: kl.

Regulations upon the subject may be prescribed by the legislature, but if they amit to make any provision in that regard, the presumption must be that they did not consider that any legislation in the particular case was necessary. Where the legislature does not prescribe any such regulations, the rule is that the old corporation owns all the public property within her new limits and is responsible for all debts contracted by her before the act of separation was passed: kl.

Through what Agency it Acts.—A municipal corporation may not through its mayor, through its common council or its legislative department by whatever name called, its superintendent of streets, commissioner of highways or board of public works, provided the act is within the province committed to its charge. Nor one it is principle be of the alightest consequence by what means these several effects are placed in their position, whether they are elected by the people of the municipality or appointed by the president or a governor. The people are the recognised source of all authority, state and municipal, and it is to this authority it must come at last, whether immediately or by a circultum process: Barnes v. The District of Colembia, B. C. U. B. Out. 1876.

PARTHERSHIP. See Persign Judgment.

QUO WARRANTO.

Irregularity in Elections—Acquiescence.—Upon a potition for a write of que warrante, to inquire by what right a pursue holds the office of predential committee of a school district, the writ will be decied when

it appears that the petitiones was elected without objection, upon the mistaken understanding of the voters that there had been no election upon a prior balloting, although it turns out that in fact another person was elected, who, at the same meeting, being ignerant of his election, disqualified himself from holding the office by accepting another incompatible therewith, and that all the voters acquiesced therein: Cute v. Farier, 56 N. II.

RAILBOAD. See Corporation.

Follows under the General Issue in Case—Right to Eject Passengers from Care for Non payment of Fare—Enempiary Danuages.—In trespons on the case anything is admissible in evidence under the general issue that shows that the defendant is not guilty of saything actionable in respect to the matters charged in the declaration: Jerome v. Smith et al., 48 Vt.

Plaintiff bought a ticket ever defendants' railmed, with checks attached. While riding over the route that his ticket took him, one conductor detached and retained one of the checks, and gave him in lieu thereof a conductor's check that was a full equivalent for the check retained. Before plaintiff arrived at the point in his journey to which the conductor's check took him, another conductor took the train, whereupon plaintiff looked for his conductor's check, but could not find it.

The second conductor demanded of him the production of the conductor's check or the payment of five, and refused to let him ride on his ticket; and upon plaintiff's neglecting and refusing to comply with the demand, the conductor ejected him from the train at a station, using no unnecessary force. Itchi, that he was lawfully ejected: Id.

Semble, In no case has a plaintiff any legal right to exemplary damages. Such domages depend upon the case and the evidence and the fading of the jury: Id.

BALE. See Contract; Debter and Oreditor.

Sur Orr.

Damages for Malicione Procession.—When a party has probable cause for instituting a soit in which he fails, the taxable casts are the measure of defendant's damages for the institution and procession thereof. If suit he brought without such cause, a suit for malicious procession is the remedy, and such claim is not the proper subject of recomposent or effect in a suit subsequently brought upon a contract, in violation of which the former soit was brought: Manyon v. Werner, 45 Vs.

SEIPPING

General Average—Repairs at Intermediate Port subject of.—Temposity repairs of demogra arising from extraordinary perils of the sea, made at come intermediate port for the purpose of prescouting the royage, if the demage to the ship was of a character to disable her and to interrupt the royage, are the proper objects of general average: Bibeas et al. v. Lord, S. C. U. S. Oct. 1878.

Wages.—The wages and provisions of the officers and crew during the cussquent and necessary interruption of the voyage, eccanioned by the disenter, are a proper charge for such proportionate contribution, wholly irrespective of the question whether the ship bere away for repairs to a port of refuge outside of the regular course of the voyage, or whether the necessary repairs were executed in the port where the disaster eccurred: Id.

STATUTE.

Construction of Retrospective—Account.—The Act of 1878, providing that " the judgment to account in the common-law action of necessar, shall not debar the defendant from making any defence before the auditor which he might here made by special plea in her of the action if said judgment to account had not been rendered," is not retrespositive and does not apply to a case in which judgment to recount was rendered and an auditor appointed before the passage of the act, but wherein the account was not taken until after its passage: Sturgis v. Hull, 48 Vt.

When the language of a statute is such that it will admit of eitherconstruction, if it appears that a retrospective construction is necessary, to accomplish and carry into effect the intent and purpose of the legislature, and no substantial rights are thereby impaired or destroyed, and ne wrong done, or when a statute is purely remedial, and does 'not take away vested rights, such a construction will be put upon it; otherwise it will be considered as prospective: Id.

TIME. See Vender.

Vendor and Purchaser.

Time—When of Essence of Contract—United States Notes—Specific Performance where Title to part of Land fails.—Where a party makes an offer to sell on specified terms, giving the proposed purchaser the eption to accept the terms within a limited period, time is to be regarded as of the essence of the offer, and an acceptance of the termis after the period limited will not be binding: Longworth v. Mitchell, 26

United States treasury notes are a lawful tender upon contracts stipuhting for the payment of money generally, whether made before or after the date of the law under which the notes were issued; and this rule applies as well in equity as at law, and as well where by the contract the payment is optional with the party and his rights made to depend upon it, as where the payment is required by the contract: Id.

Where a tenant-in-common of lend contracts for the sale and convey-ance of the entire land, with a purchaser who in good faith believes him to be sale owner, on a bill filed by such purchaser for a specific exerc-tion of the contract, equity will decree a conveyance by the vender of his interest in the had, and a compensation in money for the value of

the cuttionling interest: Iii.

AMERICAN LAW REGISTER.

DECEMBER 1876.

LIMITATIONS IMPOSED BY THE CONSTITUTION OF THE UNITED STATES ON THE TAXING POWERS OF THE STATES.

(Concluded from p. 636.)

II. Instrumentalities of the United States Government.—The Federal government is one that within the purview of the powers granted it by the Constitution, must be supreme, and all state laws that conflict with the proper exercise of these powers are invalid. This principle has been applied to the tax laws of the states, where they affect the instrumentalities which the Federal government has thought necessary and proper to be used, to carry out the powers vested in it. The Federal government thought proper to create a bank with branches in the different states, to be used in carrying on the fiscal operations of the government. The state of Maryland required every bank doing business in that state, and not chartered by the state, either to pay a stamp duty on every note issued, or pay a tax of \$1500 in gross; certain penalties were imposed on all the officers of a bank violating the law, and upon every person who had any agency in circulating such notes. An action was brought for the penalty, against the officer of a branch of the Bank of the United States for a violation of this law. was held that the law was void, and that the instrumentalities of the government could not be taxed by the state. MARSHALL, J.: "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission, but

it does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them: " McCulloch v. State of Maryland, 4 Wheat. 316, 405 (Cond. U. S. 415-421). It is conceded in this case that the real property of the bank was. lisble to taxation, and the shares of the stockholders in the state were also liable; those constituted property subject to the jurisdiction of the state to be taxed as other property in the state. But the effect of the law under consideration, was to prohibit the bank from conducting its business in the state except upon the conditions proscribed by the state. This could not be done, as it would make the Federal government, in carrying out the powers vested in it, dependent upon the states in the selection of its instruments for the exercise of its powers. In a subsequent case it was urged (Onborn v. United States Bank, 9 Wheat, 860 (Cond. U. S. 278-9)), that this was a private corporation engaged in its own business, and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs, should not exempt it from taxation. But the court did not consider it a private corporation, whose principal object was individual trade and individual profit, but as a public corporation, created for public and national purposes. The principle is applied to a tax on the stock of the United States imposed by one of the states; this was said to be a tax on the power of the government to borrow, and incomsistent with the supreme power of that government in exercise of its vested powers. The exercise of these powers can not be impeded, retarded or burdened in any manner whatever; they are to be wielded independent of the will of any of the states: Wester v. City of Charleston, 2 Pet. 448-467 (Cond. U. S. 171-175).

Congress, on the 25th of February 1862, passed a law which provides that "all stocks, bonds and other securities of the United States, held by individuals, corporations or associations within the United States, shall be exempt from taxation by or under state authority." By the laws of the state of New York, in force at this time, the capital of banks was taxed according to its value;

the Bank of Commerce claimed that so much of its capital as was invested in stock of the United States was exempt ander the Act of 1862. The Court of Appeals of New York held these stocks were not exempt: People v. Com're of Taxes, 26 N. Y. 165-6.1 The principle involved in the cases allowing the exemption was, that to tax such stock was to tax the borrowing power of the United States, that such exemption could only affect the borrowing power where it existed at the time of the loan, so as to influence the terms and conditions of the loan, to be an inducement to capitalists to part with their funds. But here the borrowing power has been executed, and the exemption confers gratuitously upon the lenders an advantage, not at the expense of the United States, but at the expense of the states. This case was reversed by the Supreme Court of the United States at its December Term 1862, the court regarding the tax as one upon the borrowing power of the United States, and equally unconstitutional whether imposed on the stock eo nomine, or on the value of the stock as included in the aggregate of the tax payer's property: Bank of Commerce v. New York City, 2 Black 620. The principle which formed the basis of the opinion of the New York court, does not seem to be noticed, except in reference to the distinction claimed between the case and that of Weston v. Charleston, as to what the court say, that the question is one of power and not as to the limits of the exercise of the power; the former is a judicial question, the latter is not. If it is admitted that the power may be exercised by the states at all, it can not be controlled; and is such an interference with the power of the Federal government to borrow money, as is inconsistent with the supreme power vested in that government by the Constitution: Id. 681-2, 684.

In April 1868, soon after the decision just noticed, the legislature of New York changed the law as to the taxation of banks, by which it was in future to be imposed "on a valuation equal to the amount of their capital stock paid in or secured to be paid in," etc. The same question was raised under this statute as to funds of the banks invested in United States securities, and the court held that a tax under this law was tax on the property of the

This court had previously held in People v. Com'rs of Taxis, 23 N. Y. 192, before the passage of the Act of 1968, that such stocks might be taxed by the state where there was no unfriendly discrimination to the United States as becauses.

bank, and that the case could not be distinguished from the former case. The tax on the capital of a bank is a tax on all the property of which it is composed: Bank Tax Case, 2 Wall. 200-209, December Term 1864. And where several persons associated together and doing business as private bankers, with all their capital invested in bonds and negotiable securities of the United States, for the sole purpose of re-selling them at a profit, and repurchasing like securities to be sold in the same manner, the capital being constantly absorbed in some such securities, is not liable to state or municipal taxation: Chicago v. Lamb, 52 Ill. 414.

Certificates of indebtedness issued for supplies furnished the government or certificates given by the treasurer of the United States to secure a loan of money, stand on the same footing as bends or other obligations of the government: The Banks v. The Mayor, 7 Wall. 16; State v Haight, 34 N. J. L. (4 Vroom) 128; so do notes of the United States under the Loan and Currency Acts of 1862 and 1868, usually known as greenbacks: Bank v. Supervisors, 7 Wall. 28; Montgomery County v. Elston, 82 Ind. 27; they are issued by the government in the exercise of unquestiened powers, which cannot be controlled to any extent by the states, and are within the enumerated class of securities exempt by Act of February 25th 1862 from taxation by state authority. So too it has been held United Revenue Stamps are not taxable by state authority (Palfrey v. City of Boston, 101 Mass. 829), on the principle of McCullock v. Maryland. While the courts hold that any tax on the securities of the United States imposed by the states is void, and corporations whose funds are so invested are. exempt whenever the tax rests upon the property of the car. poration, yet where the tax is imposed on the franchies of the corporation, is in the form of a bonus paid the state for the privilege of doing business as a corporation, the fact that the funds of such a corporation are invested in securities of the United States does not impair the validity of the tax to any extent. The laws of Connecticut require savings banks to make annual returns to the comptroller of accounts, "of the total amount of deposits" in them respectively on the let day of July of each year, and to pay

¹ In People v. Supervisors of Otrogo, 51 N. Y., the history of New York legislation as to banks, and all the cases on the subject, are given.

annually to the treasurer of the state "a sum equal to three-fourths of one per cent. on the total deposits" in the bank on that day. One of these banks had, on 1st July 1863, \$500,161 of its deposits invested in securities of the United States, exempt under Act of 1862, and it claimed that as to that portion of its deposits the tax was void. But the court held that the tax was not a tax on property, but a tax on the franchise of the bank and valid: Society for Savings v. Coite, 6 Wall. 504; Monroe Savings Bank v. City of Rochester, 87 N. Y. 865. Shareholder cannot deduct from value of share his just debts: People v. Dolan, 86 N. Y. 59.

A statute of Massachusetts requires savings banks to pay to the commonwealth, on account of its depositors, a tax of one-half of one per cent. on the amount of its deposits; to be assessed onehalf on the average amount of its deposits for six months preceding the 1st of May, and the other half on the average amount of its deposits for six months preceding 1st of November; this was held to be a tax on the franchise of the bank, and not a tax on property, and therefore valid: Provident Ins. v. Massachusetts, 6 Wall. 611. So too a statute requiring corporations having a capital stock divided into shares, to pay a tax of one-sixth of one per cent. upon the excess of the market value of all such stock, over the value of its real estate and machinery, is a tax on the franchise of the corporation and not a tax on property, and the funds of such corporation invested in United States securities are not exempt from state taxation: Hamilton Co. v. Massachusetts, 6 Wall. 682. But where depositors in savings banks are taxable for their deposits, the banks are not liable to be taxed on the investment of . the deposits in national bank stock: Augusta Savings Bank v. Augusta, 56 Maine 176.

(a) National Banks.—Most of the cases in reference to the taxation of national banks by the states, arise under the Act of June 1864, which contains this provise: "That nothing in this act shall be construed to prevent all the shares in any of said accordations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation, in the assessment of taxes imposed by or under state authority, at the place where such bank is located and not clocwhere, but not at a greater rate than is assessed upon other meneyed capital in the bands of individual citizens of such state,

provided that the tax so imposed under the laws of any state upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located. Provided also, that nothing in this act shall exempt the real estate of associations from either state, county or municipal taxes, to the same extent according to its value, as other real estate is taxed:" Brightly's Digest 66, 67, § 42. The Act of 1868 contained no such provision. In a case arising under it, it was said that the states have no power to tax the means and instruments employed by the national government in the exercise of its constitutional functions, and though the state and Congress may exercise a concurrent power of taxation over the same subjectmatter, yet it may bear such a relation to the national government that Congress, by reason of its paramount authority, may exclude the states from the free exercise of their concurrent right. where Congress in the latter case does not exercise its exclusive right of taxation, the states are left free to exercise their concurrent powers. The shares of national banks were thought to come in the latter class and to be subject to state taxation: Stelson v. City of Banger, 56 Maine 274. Some of the state courts, while recognising the Act of 1864 as valid and enforcing its provisions, question the authority of Congress to establish the national bank system: Smith, County Treasurer, v. Webb, 11 Minnesota 500, **512**.

In December 1866, the first case requiring a construction of this Act of 1864, arose out of the statute of New York, in which it was exacted "that shares in the national banks should be included in the valuation of personal property of any person or body corporate, in the assessment of taxes in the town or ward where the bank is located and not elsewhere," but contained no provision that the tax imposed should not exceed the rate imposed upon the shares of banks organized under state authority. The act was held void because there was no tax laid on the shares of state banks at all, although there was a tax on the capital of such banks: Van Allen v. Assessor— 3 Wall. 578. For an able discussion of this subject see City of Utica v. Churchill, 88 N. Y. 161. It was claimed by a minority of the court, that so much of the capital of the national banks, and the position sustained by a minority of the court, that so much of the capital of the national banks as was invested in United States

bonds was not liable to taxation, on the principle of the case of The Bank of Commerce v. New York. It was an actual, though indirect, taxation of the bonds, and it was doubted whether Congress had power, without express reservation in the loan acts, to authorize such taxation. And it was attempted to be shown that Congress did not intend to authorize the taxation of the shares of these banks without reference to the amount of capital invested in national securities: Ibid. CHASE, J., 589. But this view was repudiated by the majority, upon plain and well-known principles of law. Large and important privileges were granted to the corporators of these banks, and the tax imposed by the government of the United States, and allowed to be imposed by the states, were burdens imposed as conditions of the grant of the charters; the tax was on the franchise, not upon the bonds. And should the view be deemed even plausible, that it was a tax on the bonds, then it was a tax on the new use and new privilege conferred upon the holders of these bonds, a tax annexed as a condition to the enjoyment of this new use and new application of the bonds. Further, the bonds are owned by the corporation, a distinct person from the sharebolders; the latter are interested in the property of the bank, but they are not the owners of it, they are entitled to participate in the profits of the bank carned in the employment of its capital during its existence, in proportion to the number of shares held; and upon its dissolution, to their proportion of its property that may remain after payment of its debts; it is this interest which the states may tax and not the capital of the bank: Ibid. NELSON, J., 582-84. It is to be observed, in connection with this opinion of the minority of the court, that in the leading case on this subject (McCullock v. Maryland), where the Bank of the United States was a public corporation, created for public and national purposes, it was conceded that the shares of the stockholders were subject to taxation by the state; that they were preperly subject to the jurisdiction of the state. Soon after this decision, in April 1866, New York passed another act, taxing shares of the national banks as other personal property, in the place where located, with this proviso: "But not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this state." At the December Term 1866 of the Supreme Court of the United States, this act was held to be in conformity to the Act of Congress, and valid. Three of the judges dissented upon the some ground taken in the previous case: People v. The Commissioners, 4 Wall. 244; People v. The Commissioners of Taxes, 85 N. Y. 428. Where a state imposes a tax on the capital of state banks, the shares in the hands of the stockholders being exempt, a law imposing a tax on the shares held in national banks violates the Act of Congress of 1864 and is void: Bradley v. People, 4 Wall. 459.

The state of Kentucky passed a law imposing a tax on bank stock or stock in any moneyed corporation of loan or discount, of fifty cents on each share thereof, equal to one hundred dollars, and directed that the cashier of a bank whose stock is taxed should, on the first day in July of each year, pay into the treasury of the state the amount of tax due on the shares of the bank; imposing a penalty on cashier and his sureties for a failure to comply with the law. This is a tax on the shares of the stockholders and. not upon the capital of the bank. The circumstance that the tax is collected through the officers of the bank does not alter the character of the tax. It is a common mode of collecting such taxes. Tho officer of the bank is made the tax collector of the state. National Bank v. Commonwealth, 9 Wall. 858. People v. Bradley, 89 Ill. 180, and Me Veigh v. Chicago, 49 Ill. 818, support the doctrine that shares of national banks may be taxed by the states: s. r. Smith, Co. Trees., v. Webb, 11 Minn. 500. The doctrine of the exemption of the instrumentalities of the Federal government from taxation by the states, and its limitation, of which this case is an example, is well stated by MILLER, J.: "The doctrine has its foundation in the proposition, that the right of taxation may be so used by the states as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the states. . . . The limitation is, that the agencies of the Federal government are only exempted from state legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the states:" MILLER, J., 9 Wall. 861-62.

Where a state imposes a tax on the shares of a national bank, at the same rate as state banks, with the exception of two banks, as

to which it had previously disabled itself by a contract from taxing beyond a certain amount, the rate upon the national banks being at a rate higher than these latter banks, is not a violation of the Act of 1864. That act only requires the states to tax as far as it has capacity the shares of national banks in like manner as banks of its own creation: Lionberger v. Rouse, 9 Wall. 468. So where there is a tax on shares of national banks at the same fate as other moneyed capital, but some moneyed capital in the county where the bank is located is exempt from taxation, the tax is valid: Everitt's Appeal, 71 Penna. St. 216. The principle has been applied to cases where there is a tax upon shares of national banks and no tax upon shares of state banks, co nomine, and the tax imposed on the state banks is a full equivalent for that imposed on the shares of the national banks, as a tax of three-quarters of one per cent. on the amount of the capital stock of state banks, regardless of the fact that a portion of its capital is invested in United States securities, or has been lost in business: Van Slyke v. State, 28 Wisc. 655; Bagnall v. State, 25 Id. 112; but where the tax imposed on the capital, profits and time deposits of state banks, is subject to a deduction for real estate and United States bonds, it is not regarded as an equivalent for that imposed on the national banks: Frazer et al. v. Scibeon et al., 16 Ohio N. S. 614. Although the tax is in form upon the capital of the bank, that is, is regulated by the amount of the capital, if there be no deductions, and the same rate of tax is required, the burdon on the stockholders or on the shares is the same; but if there are deductions, then the tax on the etate banks is diminished, and to that extent the rate is higher on the shares of the national banks.

The National Banking Act requires the shares to be taxed "at the place where the bank is located and not elsewhere." The courts of Maine and other states hold that the place contemplated is the town or district in which the bank was situated: Packerd v. Lewiston, 55 Maine 456; Abbott v. Banger, 56 Id. 310; s. r. Stratham v. Mandeville, 38 Ind. 111; People v. The Commissioners of Taxen, 35 N. Y. 423-438; others that the place intended was the state, and that the state, in exercising the right of taxing the shares, might assess them at the residence of the owner or at the town in which the hank was located: Austin v. Aldermen of Boston. 14 Allen 359; Clapp v. Burlington, 42 Vt. 579. In 1868 Congress gave a legislative construction to the Act of 1864,

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by smeading that act and declaring that the words, "the place where the bank is located and not elsewhere," shall be construed to ween, "the state within which the bank is located:" 15 Stat. at Large 84. This act abolishes the rule as to shares in national . banks, that personal property of an intangible character follows the person for the purposes of taxation, and gives it a situs of its ewn, to wit, that of the state in which the bank is located, and such state may tax these shares whether the owners are residents or men-residents of the state: Providence Inst. for Savings & Jewell v. City of Boston, 101 Mass. 575; Toppan v. Merchants' Nat. Bank, 19 Wall. 491. The case last cited from Massachusetts speaks of this act as giving to national bank shares to some extent the character and fixity of real estate, and the latter is authority for the position that such shares may be assessed in the town in which the bank is located, whether the owners are residents of the town or reside in some other part of the state, or are non-residents of the state. But it is submitted that it is also true that residents of the state may still be assessed at their residence when it is different from the location of the bank. A statute contemplating such an assessment has been held valid: Austin v. The Aldermen, 7 Well. 695; but in that case the residence of the party assessed and the location of the bank were the same, and the court refused to express any opinion as to the validity of such an act, if the residence and location were different.

(b) Other Instrumentalities.—The states cannot tax an officer of the United States for his office, nor tax the emoluments of the effice. The officers of the government are necessary in its administration; if they can be interfered with in any manner by the states, the government would not be supreme: Dobbins v. Commissioners of Eric, 16 Pet. 485 (Cond. U. S. 870). But an officer of the United States army residing in Philadelphia, although without . say demiciliary intention, is liable to be taxed for his household furniture, or other personal property: Finley v. City of Philadelphia, 32 Penna. St. 381. So an enlisted soldier, possessed of real and personal property situated in the town in which he is stationed, is liable to be taxed for such property, although he is not liable to taxation by reason of his being stationed there as a soldier. And as to the tax for which he is liable, he may be arrested for nonpayment under the laws of the state: Webster v. Seymour, 8 Vt. 155. Massachusetts imposed a tax on the income from "any profession, trade or employment." A clerk in a post-office, who was appointed by the deputy postmaster, and whose appointment was approved by the postmaster-general, was assessed upon his instance, which included his salary as such clerk. It was held, that this did not come within the rule of Dobbins v. Commissioners of Eric; that was a tax upon the office, this on the income, and the clerk was made liable for the tax: Mcleher v. City of Boston, 9 Mote. 78. It is difficult to see the force of this distinction. A clerk is as necessary in carrying on the operations of the postal department of the government as the postmasters themselves, and a tax on the omoluments of the clerk, although in form a tax on income, is as much a burden upon one of the instrumentalities of the government as a tax on the income of the postmaster himself, and void to the extent that the employments of his office constitute that income.

The forts, arsenals, dockyards, mints, post-offices, custom-houses, or any other public property of the United States, are not liable to state taxation, coming within description of instrumentalities of the government, necessary to the exercise of the power vested in it : Const. U. S., art. 1, § 8, per. 17. The public domain is not liable to taxation by the states. When the government parts with the title under the land laws, it becomes liable to taxation in the hands of the purchaser. The contract of purchase is complete when the certificate of entry is executed and delivered; thereafter the land ceases to be a part of the public domain and is liable to taxation by the states: Carroll v. Safford, 8 How. 450; Witherspean v. Duncen, 4 Wall. 210. Land as such in the eccupancy of a pre-emptor, whose right to purchase has not been determined in his favor, is not subject to taxation until it has been paid for. Up to that time, it is only a proffer to a certain class of persons that they may become purchasers. People v. Shearer, 80 Cal. 645; Grand Gulf Railroad & B. Co. v. Bryan, 8 Smedes & M. 268. Parker v. Winsen, 5 Kansas 862, seems to be contrà, but this was under a treaty with Indians, providing " none of such lands shall be subject to taxation until patents are issued therefor." But where occupants of public lands of the United States, whether a pre-emptor or one without license, has placed improvements on . them, they are liable to assessment and taxation, if made so by express statute of the state: People v. Sheerer, 30 Cal. 645. This species of property, whose existence is recognised in many of the

western states, as capable of being bought, sold, and taken in execution, is thus described by SAWYER, J.: "These possessions are recognised as a species of property subsisting in the hands of the citizen. It is not the land itself, nor the title to the land, nor is it the identical estate held by the United States. It is not the pre-emption right, but it is the possession and valuable use of the land, subsisting in the citizen." The pre-emption right is thus described in another state: "Strictly speaking it is not an estate within any definition known to the common law. It is not an interest in the legal title; but only a right of occupancy for the time being, with a privilege of purchasing at some future period, at a stipulated price. It is treated as property in this state, taken and sold on execution, passes to an assignee in bankruptcy and may pass by deed or other transfer: Delancy v. Barnett, 4 Gilm. (III.) 454, 492; Pierson v. David, 1 Iowa 28; Bush v. Marshall, 6 How. 291; Thredgill v. Pintard, 12 How. 86. the possessory right in a mining claim is subject to taxation, and not within the express exemption of the act admitting California into the Union, "that the state shall never lay any tax or assessment of any description whatever upon the public domain:" State v. Moore, 12 Cal. 56; affirmed in People v. Frisbie, 81 Id. 146; People v. Cohen, 81 Id. 210; People v. Black Diamond Co., 87

The title to all land in this country is in the states, subject to the right of occupancy of the Indians, who have no right to sell or dispose of it, except by the consent of the state in which it is The state has the privilege of purchasing from the The lands occupied by the Indians are not subject to taxation by the state, but where there is a treaty by which the Indian title is extinguished, and which provides for their removal beyond the Mississippi within the period at which the purchaser at a tax sale would be entitled to possession, the lands are subject to taxation: Fellows v. Deniston, 28 N. Y. 420. Nor are these lands subject to taxation for the special purpose of surveying them and opening roads through them, although the Indians, with the consent of the United States, have agreed to sell to private individuals and to give possession within a certain period, it is only after the lapse of such period that they are taxable: The New York Indians, 5 Wall. 761. Nor is the principle affected by the fact that the primitive habits and customs of the tribe, when in a myage state, have been largely changed by their intercourse with the whites, if they still retain their tribal organization, which is recognised by the national government, as shown by having its Indian agent among them, paying annuities and dealing otherwise with the "head men:" The Kansas Indians, 5 Wall. 787.

The Pacific Railroad claimed the benefit of the principle of Mo-'Cullock v. Maryland, upon the ground that the road was constructed under the direction and authority of Congress, for the uses and purposes of the United States, and was a part of a system of roads thus constructed, and that the aids granted by Congress to the road were in exercise of its powers to regulate commerce, establish post-offices and post-roads, to raise and support armics and to suppress insurrection and invasion. The claim was not sustained, the court drawing the distinction between the means employed by the government and the property of agents employed by the government. The instrumentalities created by the government for its purposes are exempt, but a corporation deriving its existence from state law, exercising its franchise under state law, and holding its property within state jurisdiction, is liable to state taxation for its property. The railroad is only an agent employed by the government, which employment entitles it to no peculiar privileges as to the taxation of its property: Thomson v. Pacific Railroad, 9 Wall, 579; Railroad Co. v. Peniston, 18 Id. 5.

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RECENT AMERICAN DECISIONS.

Supreme Court of Rhode Island. MARIANNA RAY v. JOSIAH SIMMONS.

B. deposited in a savings bank certain money in his own name as trustee for R. and gave the bank-book to R., who was his step-daughter; R. returned the book to B., in whose control it remained until his death. In an equity sait by R. against the administrator of B., claiming the deposit as trust funds hold by R. for R.; Hold, that the trust was completely constituted.

Bold, further, that the trust being constituted, the fact that it was voluntary was no reason for refusing relief.

To constitute a trust it is enough if the owner of property conveys it to another in trust, or if the owner of personalty unequivocally declares, either enally or in writing, that he holds it in present in trust for another.

A bill in equity to enforce a trust brought against an administrator alleged that the respondent as administrator withdraw a back deposit, being the trust funds

in question. The enswer alleged the respondent's appointment as administrator in Massachusetts, and that as such he withdrew the deposit and held the same as part of his decedent's entate. Itild, in the absence of denial by the administrator, that he held the deposit as administrator in Rhode Island, that the court would presume be held it as administrator in Rhode Island and would order bits to necessar directly with the complainant, the trust having been preven.

IN EQUITY. The facts are stated in the opinion.

Charles M. Salisbury & L. Salisbury, for complainant.

Tillinghast & Ely, for respondent.

The opinion of the court was delivered by

DURFES, C. J.—The principal question in this case is whether the plaintiff is beneficially entitled to a sum of money which was formerly on deposit in the Fall River Savings Bank. The deposit was made by the late Levi Bosworth, in his own name, as trustee for the plaintiff,—the account contained in the bank-book which was furnished to Bosworth being headed as follows, to wit: "Dr. Fall River Savings Bank, in account with Levi Bosworth, trustee for Marianna Ray, Prov. Cr." The first deposit of \$484 is credited as each, under the date of April 6th 1868. The account is also credited with cash, October 81st 1868, \$50, and January 8th 1872, 870, and with divers dividends. All the dividends were credited as they accrued, except one of \$25.66, which was paid to Bosworth, October 12th 1870. And this was the only money withdrawn from the deposit by him previous to his death, which occurred September 15th 1872. The plaintiff, Marienna Ray, is the daughter of Ruth M. Bosworth, the widow of Levi Bosworth, by a former husband. She lived in the family of Levi Bosworth for several years previous to his death. Levi Bosworth had no children. Mrs. Bosworth testifies that he treated the plaintiff as his daughter. She also testifies that the first she knew of the bank-book, Mr. Besworth brought it home and threw it in the plaintiff's lap. The plaintiff opened and read it, and said she was much obliged for the present. Bosworth said nothing in reply. She, Mrs. Boswerth, put the book in a box where she kept her own bank-book, a bank-book of her daughter, and bank-books belonging to her husband. She says he carried the book to Fall! River three times to have the interest entered, and gave it to the plaintiff on his return. He was a man of few words, and would do things without explanation. When he made the last deposit

of \$70 and gave the plaintiff notice of it, she, Mrs. Bosworth, said to him: "I don't know about your making such presents!" to which he replied, "I shouldn't think you need trouble yourself about it; if anything happens to her, you will hold it."

The plaintiff claims to be entitled to the deposit, as money held in trust for her by Levi Bosworth. The defendant, as administrator on Dosworth's estate, resists the claim. His answer to her bill avers on information and belief that Bosworth made the deposit in his name as trustee for his own convenience, and because he had another deposit in his own name to as large an amount as the bank would receive on any one account, and therefore, to induce the bank to receive the further deposit, he put it in his name as trustee, as is a very common practice in such cases, siways retaining the book under his own control. In support of this averment the defendant testified that Bosworth told him, when he was building his house, that he had money deposited in the Fall River Savings Bank, in his own name, to as large an amount as he could deposit in his own name, and in another person's name, but did not say in whose name. He also testified to conduct and admissions, on the part of the plaintiff and her mother, at varience with the plaintiff's present claim. We, however, refrain from reciting this testimony, because, in view of the explanations given by Mrs. Bosworth, we are not prepared to believe that her testimony is substantially incorrect.

The defendant contends that the plaintiff is not entitled to relief, because there was no effectual trust, inasmuch as Bosworth, by retaining the book, always kept and intended to keep control over the deposit for his own use, and did in fact so control it by receiving the dividend which was paid to him October 12th 1870.

We think, however, the trust was completely constituted. Levi Boswerth deposited the money in the bank to himself as trustee. The bank, receiving it, credited it to him as trustee, and, from time to time, credited to him as trustee the dividends accraing thereon. It gave him a bank-book in which these credits were entered. Bosworth moreover communicated to the plaintiff the fact that he had made the deposit to himself as her trustee by letting her have the book. It is urged that the book was returned to him by her, and retained by him. But the book was given by the bank to him as trustee, and as trustee he would properly re-

tain it. All was done which the plaintiff could ask, unless she desired to have the money paid or transferred to her, which would be not constituting the trust, but carrying into effect and discharging it. Boswerth might have declared himself more explicitly; but, supposing his object was to create a trust and make himself the trustee, we can think of no act necessary to effect his purpose which he has left undone.

When the trust is voluntary, courts of equity do not enforce it, so long as it remains inchoate or incomplete; but when once the trust has been constituted, they do not refuse relief because it is voluntary: Stone et al. v. King et al., 7 R. I. 858. A person need use no particular form of words to create a trust, or to make himself a trustee. It is enough if, having the property, he conveys it to another in trust, or, the property being personal, if he unequivocally declares, either orally or in writing, that he holds it is presenti in trust or as a trustee for another: Ex parte Pye, 18 Ves. Jr. 140; Milroy v. Lord, 4 De G. F. & J. 264; Richardson v. Richardson, Law Rep. 8 Eq. 686; Kekewich v. Manning, 1 De G. M. & G. 176; Morgan v. Malleson, Law Rep. 10 Eq. 475; Penfeld v. Mould, Law Rep. 4 Eq. 562; Wheatley v. Purr, 1 Keen 551 and note; M'Fadden v. Jenkyne, 1 Hart 458; affirmed on appeal, 1 Phillips 153; Thorpe v. Owen, 5 Beav. 224. And the creation of the trust, if otherwise unequivocal, is not affected by the settler's retention of the instrument of trust, especially where he is himself the trustee: Exton v. Scott. 6 Sim. 31: Fletcher v. Fletcher, 4 Hare 67; Carson's Adm'r v. Pholps, 14 Am. Law Reg. N. S. 100; Souverbye et ux. v. Arden et als., 1 Johns. Ch. 240; Bunn v. Winthrop et als., 1 Johns. Ch. 829.

In Wheatley v. Purr, 1 Keen 551, the settler instructed her bankers, with whom she had a deposit of 8000L, to place 2000L in the joint names of the plaintiffs and her own, as trustee for the plaintiffs. The sum of 2000L was entered by the bankers in their books to the account of the settler as trustee for the plaintiffs, and a promissory note given for it payable to the settler trustee for the plaintiffs, or order, fourteen days after sight. A receipt for this note was signed by the settler and given to the bankers. The trust was held to be effectually vested. In our opinion, the case is not distinguishable from the case at bar. Indeed, the case at bar is stronger, in that notice of the trust was communicated to the

cestul que trust. And see Millspaugh v. Putnam, 16 Ab. Pr. 880; Howard, Adm'r, v. Savinge Bank, 40 Vt. 697. .

The counsel for the defendant calls our attention to the declaration made by Mr. Bosworth while his house was building. The declaration was casually made, and may have been misunderstood. But, supposing it was correctly understood, we do not think we can allow it to alter our decision. The trust, except in so far as it was increased by subsequent deposits, was, in our opinion, created before the declaration was made; and no such declaration, made after the creation of the trust, could have any legitimate effect on it. The same is true in regard to the withdrawal of the dividend. It may be remarked, also, that the dividend withdrawn was more than replaced by the seventy dollars afterwards deposited.

The counsel for the defendant also calls our attention to the cases of Brabrook v. Boston Five Cents Savings Bank, 104 Mass. 228, and Clark v. Clark, 108 Id. 522. These are cases in which A. deposited money in a savings bank in his own name as trustee for B., but always retained the bank-book, and never communicated to B. any notice of the deposit. They are cases at law. The court ruled that B. was not entitled to the deposit, being neither party nor privy to the transaction. In one of the cases, the court found, as a fact affirmatively proved, that no actual gift or trust was intended. We do not think the cases are precedents which should govern the decision of the case at bar.

The bill is against the defendant, as administrator on the estate of Levi Bosworth. It alleges that the defendant, as administrator, has withdrawn the deposit and new has it in his possession, and refuses to pay it to the plaintiff. The answer alleges that the defeadast was appointed administrator in Massachusetts, and as such withdraw the deposit; but does not dony that he now holds it as administrator in this state, but avers that he new holds the same as a part of the cetate of the decedent. From this we presume that he holds it as administrator in this state. In this view, we think the defendant may be held to account directly with the plaintiff, and will decree accordingly.

general subject of gifts of chattels with- charge of inconsistency and see out actual delivery of the subject-mat- in this branch of the law, a sureful

Although the cases relating to the tor of the gift, may seem to warrant the

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study of the facts of each case will show that in most instances the inconsistency is more seeming than real. At common law, actual delivery and transmutation of possession was essential to the validity of the gift. In the class of tasse here to be noticed, by the application of equitable principles in establishing a trust relation without this actual delivery, the intentions of the denor have been effectuated.

These cases naturally divide themsolves into three chares: I. Where
there has been a formal written declaration of trust. S. Where there has been
no such formal declaration, but a trust
is implied from the words and actions
of the parties. S. Where a formal ensignment of a chose in action, though
inappable of possing the legal title, has
been construed as a declaration of trust.

. 1. The cases of this class, though few, see important, because in them is first recognised the principle, that if the trust relation is clearly established, equity will enforce it, although the trust be voluntary. In Ellison v. Elliren, 6 Yes. Jr. 886, Lord Elbor said: "I take the distinction to he, that if .yeu want the assistance of the court to constitute you ecreal que trust and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you costs que trust, as upon a covenant to transfer stock, &c., if it moto in covenant, and is purely voluntary, this court will not execute that voluntary sevenant; but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court." In Ex parts Pye, 18 Vec. Jr., the same judge said: "The question involved is, whether the power of attorney here execute to a declaration of trust. It is clear that this court will not periot a volunteer; yet if the act is completed, though voluntary, the court will not upon it. It has been decided,

that upon an agreement to transfer stock, this court will not interpose, but if the party had declared himself to be the trustee of that stock, it becomes the property of the cestai que trust without more, and the court will act upon it."

The principles thus stated, being once established, little difficulty has been found in determining questions arising in cases of the first class. The difficulty in their application to eases of the neened and third class arises from the uncertainty whether, in each special case, a trust has been created. The criterion to be applied is, do the facts warrant the belief that the donor intended to direst himself immediately of all heneficial right, title, or interest in the property given, and that he did everything which, considering the relation he might. in each particular instance, bear to the donce, and the nature of the property given, he could reasonably be expected to do, to unmistakably evince such an intention.

2. These cases of the second class may profitably be sub-divided according as the subject of the gift is a substantial chattel, or a chose in action. Living animals have been the subjects of nearly all the controversies which have arisen over alleged gifts of substantial chattels.

In Hillebrant v. Lewis, 6 Texas 48, a father branded certain cattle with a brand recorded in the name of an infant daughter, accompanying his action with declarations of a gift. The court hold that there acts evinced an unwistakable intention, and that all was done which a father could do to complete a gift to his daughter, regarding his subsequent procession as that of a trustee. "What will amount to a delivery must depend on the nature of the thing and the circumstances of the case. Actual manual delivery is not in all cases necessary. Where the thing is incapable of actual delivery, or where the situation of the parties or the circumstances of the case

will not admit of it, it may be symbolical or constructive. There may be circumstances under which a gift may he valid and complete, as between donor and dones without delivery, and the possession of the former will not be inconsistent with the right of the latter." Johnson v. Arrens, 22 Louisiana An. 144, is distinguishable from this case, because there it appeared that the father when he branded the cattle had no presout intention of giving them to his daughter, but to please her, as the statement of fact reads, allowed them to be called here, and have a special brand placed upon them, intending finally to give them to her. When her subsequent marriage displeased him, he changed his purpose, and the court held, that there was no evidence that he had ever manifested an intention to divert himself of the property in them. In Brink v. Gould, 7 Lans. 425, a mother. owning two heifers, said to her daughter, then on a visit, "You may have either of them, whichever you choose." The holfers were not in sight; the daughter made no reply, and nothing more was said or done. The gift was held to be incomplete, because in view of the fact that the mother and daughter were living apart, a transmutation of personal would have been the natural consequence of a completed gift.

Awarer v. Venes, 37 Missouri 427, was decided on similar grounds, Waswan, J., saying: "It is essential to a gift that it go into diffect at once, and completely." If it regards the fature, it Is but a promise, and being a premise without consideration, it cannot be enferced and has no legal validity." Breser v. Heroeg, 72 North Car. 176, to a case where a different judgment, it would seem, might have been given without stretching very far the destrine of a trust implied from the acts and relations of the parties. A father pointed out a celt to his daughter, saylaw: 4 That is your property: I also it

ing with her father, and remained so until his death. Although the calt continued in the father's stable, it might have fairly been said, that considering the relation of parent and child, no actual change of possession could have been expected. The attention of the court does not appear to have been directed to the dectrine of the establishment of a trust, and it may be presumed that it entirely escaped their consideration.

Cranford's Appeal, 61 Penn. St. 22. seems to hold that in cases of gifts by husband to wife, or parent to child Hving at home, the necessity for an artnet change of passession does not exist; Asurw, J., saying: "The tide of the wife to the \$5000 credited to her on her husband's books could not be supported in an ordinary gift between strangers. Where the gift is not executed by delivery, but the determining act remains in fieri, the law gives no force to the more intention to do it. But in this case, are not the facts sufficient to show an executed intention fullowed by a trust? The transaction was between bushand and wife, and therefore influenced by their pocalier valuation. He came in and said to ber, "I bare added \$3000 to your little menoy, and after a while I am going to give you \$8000 more." He did not hend ber the money thou, or at any time. But we And the mency credited as if insually received, carried into an account of moneys admitted to belong to ber. mingled with it, interest credited ness it, finally consolidated to the necessari. and interest added on the total sure. This is certainly ample evidence of an executed gift, followed by an express trest in the form of an account for h and its accreed interest, remaining unrevoked or denied by the decedent up to the time of his death. It cannot be doubted then that Crawford Intended to forter trees blowelf and the arters of

admitted gift, and to become trustee of the fend. It is true that there was no formal passing of the money between them, but this was a nacloss ceremony between husband and wife, where there is a clear executed intention to become the trusten of the fund for her benefit. In order to make such a formality effective, a witness must be called to see him hand the money to her and straightway receive it back. But of what greater efficacy would this be then the hesband's own admission in his book, and his express direction to his bookkeeper? The difference is clearly one of the merest form, and not substance. Of what possible use can it he to go through a more ceremony where the evident intent is to assume immediate possession as trustee?" If the court had applied these principles in Brower v. Hervey, supro, the daughter prohably would have kept her colt.

The principal case is one of several that have arisen in consequence of the alleged gift of hank deposit-books. These cases have been decided upon the same principle. The question for inquiry has been, Has the the donor clearly evinced his intention to create a trust, and has he done all that he ought to have done to make that trust relation complete?

In Miner v. Rogers, 40 Conn. \$12, the defendant's intestate deposited \$250 in a savings bank, receiving a deposit-book made out in her own name, "Mary Daniels, trustee of William A. Minor;" at the same time informing Minor's father of her action, but before her death draw out the deposit. In an action by Miner against her edministrator for stoney had and received, the court said: "It is evident that she did all that she thought necessary to be done to perfect the gift, and supposed that she had nocomplished the object. If she had made the deposit in the name of the plaintiff alone, or had made some other person than herself trustee for the plaintiff, no question could have arisen regarding the completeness of the gift. But the beneficial interest is as much given as it would have been if either of these modes had been adopted. The deposit is made in the bank for the plaintiff, and the bank is informed of the fact. Here is a delivery of the beneficial interest. No more would have been done if the deposit had been made in the name of a third party for the plaintiff." Comp's Appeni, 36 Conn. 36, and Hill v. See nson, 63 Maine 364, contained the additional fact that the books were actually delivered to the donces, but the deposits were simply made in the name of the donor. The gifts were sustained as valid. In Blandell v. Locke, 82 M. H. 238, the denor deposited money in a savings hank, taking a book in the name of her niere, and just before dying informed her of the gift, and in Howard v. Windhon Bank, 40 Vt. 507, where the facts were similar, except that the dones did not know of the intended gift, the gifts were sustained. In Gurdar v. Merritt, 32 Md. 75, a deposit was made by a grandmother in the name of Are minor grandchildren, but subject to her order, or that of her daughter. About the time of making the deposit, she said "she was going to put the tnoney in bank for the children." After her death, her daughter drew it out and administered it as part of the assets of the estate. In an action by the grandehildren against the daughter to recover the amounts of the deposits, the court said: "A gift is imperative without delivery. To be valid it can have no reference to the future, but must go into immediate and absolute effect. To the perfection of a parol gift of a chattel, delivery is necessary, and without actual delivery no title passes. The delivery may be to the dones, or to any balles of the dones; all these conditions were met in this case. The money was delivered by the denor to the bank as balloe of the infents,

with the direction that it should be entored to their eredit in accounts standing open in their names. The delivery to the bank for the benefit of the grandchildren was a perfected gift to them. and the control retained by her or her daughter was a control for the benefit of those for whose use the money was delivered, and not such control as would pertain to a continuing legal power and deminion ever it, which would leave the donor a locus penitratie." In full accord with these cases are Millspaugh v. Putness, 16 Abb. Pr. 300, and Wheetleg v. Purr, 1 Keen 351. In Bland v. McCallough, 9 Weekly Rep. 48, A. from time to time parchased debentures to the amount of 3000f., and gove them into the castedy of B., who lived with him as a wife. B. ains, as they were perchased, from time to time received the stockbruker's receipts, and cut of the coupons as they matured, and accompanied A. to receive the dividends. A. had promised B. the debentures hefore they were purchased, and subsequently acknowledged and alluled to them as hers. Vice-Chanceller Stuant held this to be a completed gift. For cases where under doubtful circumstances alleged gifts have been sustained. see Penfield v. Thayer, 2 F. D. Smith 365, and Lames v. Inc. Co., 36 Conn. 294. McFodden v. Jenkyns, 1 Phillips 138, established the proposition that a declaration of trust may be implied without any evidence of it in writing. A. shortly before his death sout a verbel' mercage to B., his debtor, deviring him to hold the debt in trust for C. B. acecoted the trust, and the transaction was communicated to C. both by A. and B. Upon a bill in equity being filed by C. to restrain A.'s executors from collosting the debt from B., Lord LTVD-MUROT said: "A. in directing B. to hold the menoy in trust for C., which was assented to and acted upon by B., impressed, I think, a trest upon the money which was complete and irre-

vocable. It was equivalent to a declaration by A. that the debt was a trant for C. The transaction bears no resemblance to an undertaking or agreement to assign. It was in terms a trast, and the aid of the court was not necessary to complete it."

The principles upon which these eases rest, and what are the requisites and evidence of a complete declaration of trust, will be better understood when certain cases are considered where alleged gifts have been held invalid because they lacked some such regulates, or the evidence of a conploted declaration failed. In Trimmer v. Danig, 26 Law Jour. Ch. 434, upon the death of a testator ten Austrian bonds were found, among other securities, in a box at his house with the fullowing indersoment: "The first five numbers of these Austrian bonds belong to and are H. D.'s property." signed by the testator. M. D. was his housekeeper, and had the key of the bez in her causedy. Vice-Chanceller XIV-DEBOLET said: "These bonds are copable of being transferred by hand. and as there was no actual delivery 3 must treat them as part of the assets of the estate." In this case it will be percoived that there was no reason why the tentator, if he had intended to give the bonds to H. D., should not have actually delivered them. If there is any onepicion that an affegad gift was not to have an immediate effect, or if the denor deet not do all that might he exposted of one under the same circumstances to evince that such was his intention, the intended gift must full.

The facts of Morray v. Camen, 41 Md. 466, bear some resemblance to those in Gardeer v. Morritt, supra, and the court, judging from their opinion, do not room to have had that once called to their attention, also certain expressions in the opinion would have been modified. J. C. opened an account in a servings bank " to the credit of J. C.,

subject to his own order or to the order of M. E. C.," his daughter, to whom the deposit-book was given, with the statement that it was for herself and her brothers and sisters. It will be even that no trust was expressed in the deposit-book, and it also appeared that the bank had no notice of the interest of the alleged denoce. This clearly distinguished the two cases on principle, and the court held that no trust could be implied from the evidence of the statements of J. C. and placing the book ja the hands of his daughter. The more pessention of a mortgage, together with loose statements of the mortgages impersing a gift to the helder, is not suffelent evidence of a gift to enable such bolder to maintain an action upon the mortgago : Jahnson v. Spice, 5 Hun 466.

The evidence that the acts and declarations of the denor imported a present gift, and not an intention to make one in the future, must be clear: Ingler v. Steples, S R. I. 170, Lord CRAHWORTH. in Scales v. Monde, 6 De Gez, M. & G. 48, was led into certain expressions, which he subsequently in Jenes v. Looks, L. R. 1 Ch. 25, repudiated, as not a true expecicion of the low. The correctness of the decision in the case, however, remains anquestioned. In Santes v. Maude. the true ground upon which the decision should have been put was that the gift yas testamentary, and that there never was a equiplete declaration of trust. East CRASWORTS, however, said, and this is what he subsequently repudiated: 44 Even If it were a declaration of trust. it would be invalid for want of consideration. A more declaration of trust by ... the owner of property in favor of a voluntour, is inoperative, and this court will not interfere in such a case." In Jones v. Doche, a father put a check late the hand of his infact son, nine months old, saying: "I give this to hely for himself," and then took back the check, and put it its his safe, saying to his wife, " I on going to put this away for my son."

Lord CHARWORTH said: "This is a special case, in which I regret to say that I cannot bring myself to think that either on principle or on authority there has been any gift or valid declaration of trust. No doubt a gift may be made by any person sui faris and compos. mentis, by conveyance of real estate, or by delivery of a chattol, and there is no doubt, also, that by some decisions, unfortunate I must think them, a parol declaration of trust of personalty may be perfectly valid, even when reluntary. If I give any chattel, that, of course, passes by delivery, and if I say, expressly or impliedly, that I constitute myself a trustee of personalty, that is a trust executed, and capable of being enforced without consideration. I do not think it necessary to go into any of the authorities cised before me; they all turn upon the question, whether what has been said was a declaration of trust or an imperfect gift. In the latter case, the parties would receive no aid from a court of equity if they claimed as volunteers. But when there has been a deciaration of trust, then it will be enferced, whether there has been consideration or not. Therefore, the questian in each case is one of fact. Has there been a gift or not; or has there been a declaration of trust or not? I should have every inclination to sustain this gift, but unfortunately I am enable to do so. The case turns on the very short et bebreini cones, rottette · make a declaration that he held the proporty in trust for the child, and I connot come to any other conclusion then that he did not. I think it would be of very deagerous example if loose conversations of this sort in important transactions of this kind should have the effect of declarations of tract." Warriner v. Rogers, L. R. 16 Eq. 840, contains a careful analysis of compilented facts by Vice Chanceller Bacon, wherein the difference between a comploted declaration of trust and declar

retions of testamentary intent are elearly set forth.

3. There are cases in which voluntary written assignments or settlements of choses in action have been sustained as declarations of trust upon the principle that a declaration of trust is not confined to any form of words, but may be indicated by the character of the instrument. In these cases it is not nocornery that there should be any actual transfer of the legal estate; the seconrial act is that the gift he perfected and compléte, resting neither in promise nor unfulfilled intention. In Kelewick v. Manning, 1 De Gez, M. & G. 176, Miss Mekewich being on the point of marrying Sir Henry Farrington, made a settlement of property, in trust, for the use of herecif, husband, and the issue of the marriage, with remainder over to certein volunteers. The hashand died, leaving no bone, whereupon Lady F. made a new settlement for a valuable consideration, the objects of which were different from those of the first. The remainder-men in the first settlement filed a bill in equity to enforce its trusts. The Lords Justices held, that they were entitled to the relief they asked, L. J. KRIONT BRUCE saying: " It is probably, or certainly in some instances, the course of this jurisdiction to decline acting at the suit of these whom it terms voiunteers, though within that description a person claiming directly and merely under a gratuitous promies, oral or not under seal, which is nuclear pasture, may be thought perhaps hardly to come, for such a person has in effect had no promice at all. In effect, no contract has been made with him. But whotever rule there may be against 'voluntuers,' it does not apply to the east of one who, in the language of this court, is termed a certal que trast, claiming against bis trustee. For that which is considered by this jurisdiction a trust may certainly be created gratulturally. So that the absence of consideration for its ereation.

is in general absolutely immaterial." In Reseell's Appent, 75 Ponn. St. 209, the facts were almost identical with Kebewich v. Monaing. A woman, in contemplation of marriage, conveyed her estate to trustees for the use of herself during life, then for her children according to her testamentary appointment, with remaind a over in default of issue to her brothers and eleters. The husband baving died first without lases. the settler flied a bill to revoke the trust. and the court, while assenting to the general principles as settled to Kalawish v. Manning, and other cases, held that the purpose of the trust having falled, the absence of a power of syvecation in the deed was under the eigenmeanance a mistake which entitled the settlet to relief, and accordingly ordered the trustees to reconvey to the settler in Asp. In. Richardon v. Richardon, L. E. S Eq. 484, E., by voluntary dood, assigned certain specific property, and " all other the personal estate whatsourer and wheresoever" of her, the said E., to E. absolutely; at the time of this nesignment, E. was presented of, amongst other property, certain premiserry mates which were not mentioned specifically in the deed. Upon R.'s death these notes were found in his possession, but not endorsed to him; there was no oridence as to any delivery of the potes by E. to B. Ifold, that the accignment operated as a good declaration of trust. Referring to Kalessich v. Manufey, Visa Chane. W. Pies Weep self: "After that decision, I think it is impossible to contend that these notes did not pase by this instrument, because the suje fail. down in that case, the decision by which was supported by reference to Ex parts Pyr, 18 Yes. Sr. 148, was not qualital merely to this, that a person who, being entitled to a reversionary interest, W to stock standing in enother's worth, areigns it by a releasery died, then passes it, notwithstanding that he does · set in fermal terms dealers blacely to

be a trustee of the property; but it amounts to this, that an instrument exocuted as a present and complete assignment (not being a more covepant to assign on a future day) is equivalent to a declaration of trust. The good sense of the decision I think lies in this, that the real distinction should be made between an agreement to do semething when called upon, something distinctly expressed to be future in the instrument. and an instrument which affects to pass everything independently of the logal estate." Licry v. Licry, 7 Berr 251, was a case somewhat similar in principie. A bond was delivered by an obligoe to an obligor, to do with it what be pleased, and the act was sustained as a completed gift. In Bond v. Dunting, 78 Penn. St. 210, Martha Bood took out a policy of insurance upon the life of ber busband. The day before his death, he joined her in an assignment, under seal, of the policy in trust, as to part of the proceeds for certain children of his by a former merriage. Notice of the assignment was immediately given to the treatees. The trust was upheld upon the principles stated in the foregoing encou, SHAMSwood, J., saying: "Delivery in this, as in every other case, most he according to the nature of the thing; it must be secundus subjection materiam, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing be not capable of actual delivery, there must be some act equivsleat to it. The donor west part not only with the possession, but with the dominion of the property. If the thing given be a chose in action, the law required an assignment, or some equivelest instrument, and the transfer must be actually executed. To held otherwise would be in effect to decide that the owner of a chose in action, not evidensed by a note or band, or other in-. strument, sould not make a gift of it, which would be an uncessonable limits-

tion of the right of property. It is certainly the tendency of all the modern authorities to maintain the general dectrine which may, indeed, be stated as a formula, that wherever a party has the power to do a thing, statute provisions being out of the way, and means to de it, the instrument he employs shall be so construed as to give effect to his intention. It cannot be doubted that Mr. and Mrs. Bond could, by a declaration of trust under seal, have coustituted themselves trustees for the purpasses set forth in the instrument, and why, if it connot, for want of consideration, operate as a good equitable assignment, may it not be effectual as a deciaration of trust ?"

Morgen v. Medleson, L. R. 10 Eq. 478, comes very close to the line, and has been criticised in some later cases. The facts, however, seem to warrant the decision. S. signed the following memorandum: "I hereby give and make over to Dr. Morris an India Bond, No. D. 506, value 1000(,, as some token for all his very kind attention to me during illness. Witness my hand this 1st day of August 1968. (Signed) John Saunders." This memorandum was handed over to Dr. Morrie, but the hand remained in the possession of S. It was held to be a valid gift. The distinction between this case and Trimmer v. Danby, supra, is that the assignment was delivered to the dones in the one case, while in the other it was not. Distinguishable from Dond v. Bunting for the same reason to Trough's Estate, 78 Penn. St. 118, and Zonmormon v. Streeper, Id. 147. If the subject-matter of the intended gift be shares of stock in a company whose charter or by-laws regains certain forthalities to make the transfer effectual, it is essential that the prescribed formelities he compiled with. The reason seems to he that the donor has failed to do all which soight be expected of him to make his intended gift complete:

Searie v. Low, 18 Sim. 98; Milroy v. Lord, 4 De Gex, F. & J. 964. Several English decisions also require that netice of the assignment be given to the trustee, if one is named: Merk v. Kettlewill, 1 Here 464; and if there is no trustee named, then to the coval que trust: Edwards v. Joses, 1 M. & C. 236. The burden of showing the completed character of the gift is upon the dence, and if the case is doubtfel upon

the facts, the gift easiest be sestained:
Antrober v. Smith, 12 Versy Jr. 29.
The facts of Kennedy v. Ware, 1 Barr 448, are not clearly stated in the report, and as the law is undoubtedly as stated in the opinion, in the absence of a trust relation, and as no mention is made of the establishment of a trust relation, it must be presumed that there was nothing in the facts to warrant such an hypothesis.

R. C. D., Jn.

Supreme Judicial Court of New Hampohire. ROWE v. PORTSMOUTH.

A city, having power by statute to construct public sewers, and to demand and receive pay from adjoining owners for liberty to enter their private drains into such sewers, is responsible for negligently suffering them to accession a unicance to the estates of such adjoining owners, if the unicance does not result from the original plan of construction, and could be avoided by keeping them in proper condition.

In maintaining such public sewer, a city is bound to use that degree of care and prudence which a discreet and cautious individual would use if the whole less or risk was to be his alone.

A city will not be liable for injuries eased to individuals, by an electraction in such public sewer not placed there by its own officials or by natherity of the city government, until after actual notice of such obstruction, or until, by reason of the lapse of time, actual notice may be presumed.

CASE to recover damages sustained from a flow of water into the cellar of the plaintiff's house from the defendants' common newer. Plea, the general issue. The case was referred to a refcree, under the statute, who reported the following facts as proved: Prior to the month of July 1872, the defendants, for more then twenty years, had a common sewer leading from High street down through Hanover street by the plaintiff's dwelling-house, and emptying into the North Mill-pend, and the plaintiff's cellar was drained by a private drain leading into the defendants' common sewer of right. In 1867 a new tile drain was laid by the plaintiff in place of her old one of wood, which was discontinued, and said new tile drain led into the defendants' sewer. In 1867 the defendants built a new common sewer in place of their old one, which was discontinued, of coment stone pipe one foot in diameter, laying the same outside of the old sewer, nearer to the plaintiff's dwelling-house, and, in consequence, cut off all the private drains Ves. XXIV.—90

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sewer, including the plaintiff's drain; that the defendants, in laying said new sewer, a short distance below the place where the plaintiff's drain entered it, found a water-pipe, one inch in diameter, running across the proposed course of their sewer at right angles, and they cut their sewer-pipe so as to let it down ever said water-pipe, so that the said water-pipe passed through the centre of said sewer-pipe. It is provided by ordinance of said eity "that the city councils shall have power to construct drains and common sewers through highways, streets," &c., "and may require all persons to pay a reasonable sum for the right to open any drain into any public drain or common sewer."

In the month of July 1872, by reason of a lady's parasol orsunshade floating down said sewer and catching on said water-pipe, said sewer became obstructed and choked up, so that on July 4th, after a shower, the water flowed back from said obstruction through the plaintiff's drain into her cellar, causing her damage and annoyance; and so, likewise, at three different times thereafter during the month of July, at the last of which times, by reason of there being a very heavy shower, and by reason of the said defendants' common sewer having become more choked and obstructed at said water-pipe, the plaintiff's cellar was nearly filled with mud and water, her provisions and produce destroyed, and the cellar and house damaged. The plaintiff each time notified the city marshal, who lived in her neighborhood; but it did not appear in evidence whother or not the marshal notified any other city officer until the last time, when he notified the mayor and one of the aldermen, and thereupon the defendants proceeded to examine their said sewer, and found and removed the obstruction aforesaid. ebstruction would not have happened had said water-pipe not been allowed to run through the defendants' said sewer; but said sewer, as constructed, was sufficient for the purpose of carrying off the water had said obstruction not occurred as above stated. There was no evidence to show in what manner said parasol or sunshade extered said sewer. Upon the foregoing facts the referee found that the defindants were guilty in manner and form as the plaintill had declared against them, and assessed damages in the sum **al \$253.50.**

Upon the return of said report the plaintiff moved for judgment thereon in her favor for the amount found by the referee, and

the court pro forms granted the motion, to which the defendants excepted.

The questions arising on the forgoing statement of facts and ruling of the court were transferred to this court by STANLEY, J.

Frink, for the plaintiff.

Hedgdon, for the defendants.

SMITH, J.—The defendants raise three questions upon the report of the referee: (1) That no action will lie against a city for neglect to build or repair a sewer; (2) That if such action will lie, a city is answerable only for neglect to use ordinary vigilance and care to keep its sewers open and free from obstruction; and (3) that the defendants did not receive seasonable notice of the obstruction to prevent the injuries which the plaintiff has received.

By ch. 44, sec. 9, Gen. Stats., it is provided that "city councils shall have power to construct drains and common sewers through highways, streets, or private lands, paying the owners such damages as they shall sustain thereby, said damages to be assessed by the mayor and aldermen in the same manner and with the same right of appeal from their decision as in case of the laying out of highways; and may require all persons to pay a receasable same for the right to open any drain into any public drain or common sewer." This section is an exact re-enactment of section 21 of the act to establish the city of Portsmouth, approved July 6th 1849, under the authority of which the defendants must have rebuilt · their sewer in Hanover street in the year 1867, the General Statutes not taking effect till January 1st 1868. The statute authorized and empowered the defendants to construct public sewers, but did not impose that duty upon them. It was optional with the defendants whether they would or would not take the benefit thus conferred upon them. This authority the defendants accepted when they accepted their charter in 1848, under the provisions of section 28; and it needs no argument to show that a city which constructs sewers under the authority of a statute, virtually accepts the power therein conferred, and will not be admitted to allege the contrary. This case, therefore, is not to be distinguished from Child v. Boston, 4 Allen 41, upon the question of acceptance by the defendants of the statute conferring the authority to construct sewers. When, then, the defendants made their

election by accepting the Act of 1840, and by executing the powers therein granted, and also granted by the General Statutes, and received pay from the plaintiff for opening her drain into their public sewer, the question arises whether they are liable to her for injuries sustained by her by reason of their neglect to keep their sewers in proper repair.

Under what circumstances a municipal corporation will be hold liable to an individual suffering injuries from the neglect of such corporation to perform a public duty, was very fully discussed by PERLEY, C. J., in Eastman v. Meredith, 86 N. II. 284. case it was decided that though a town-house, which was erected by the town, was so defectively constructed that when a town meeting was held in it the floor broke down and a voter was thereby injured, yet he could not maintain an action against the town to recover damages for the injury. But the learned chief justice remarks: "Grants are sometimes made to particular towns or cities of special powers not belonging to them under the general law; and there is a class of cases in which towns and cities have been held liable to civil actions for damages caused by neglect to perform public duties growing out of the grant of such special powers—as the power to bring water by an aqueduct for public use by those who pay a compensation for it, to light the place with gas on the same terms, or to make and maintain sewers at the expense of adjoining proprietors. Thus, in The Mayor, fc., of New York in Error v. Furse, 8 Hill 612, the city was empowered by special act to lay down and maintain sewers, and charge the expense upon owners and occupiers of houses and lots intended to be benefited; and it was held that an individual might maintain an action against the city to recover damages for a private injury which he had suffered from neglect of the city to keep the sewers in proper repair. The distinction between the liability of towns and cities for neglect to perform public duties growing out of the powers which they exercise under the general law, and their liability when the duty arises from the grant of some special power conferred on the particular town or city, is recognised or explained in Bailey v. Mayor, 4e., of New York, 8 Hill 581."

Judge PERLEY further says, page 298, "In such cases the special powers thus granted are not held by the particular town or city under the general law, and as one of the political divisions of the country. The public duty grows out of the special grant of power,

and, though held and exercised by a town or city, the nature of the power granted is the same as if a like power had been conferred on a private corporation created to answer the same public object: and the cases above referred to hold the town or city liable to a civil action for neglect to perform a public duty arising from the grant of the special power in the same way, and, as I understand them, upon the same grounds and reasons as private corporations are held, which are clothed with the same powers and bound to the performance of the same public duties. So far as I have had opportunity to examine this class of cases, they appear to go upon the ground that the special power, though no direct posuniary profit may be derived from it, is granted as an immunity and peculiar privilege for the benefit of the particular town or city, and is accepted, as in the case of a private corporation, upon the implied condition of performing the public duties imposed by and growing out of it: Henley v. Lyme Regie, 1 Bing. N. C. 222; Mears v. Wilmington, 9 Ired. 78; Mayor, fe., of New York v. Bailey, 2 Den. 456."

It is well settled that a private action cannot be maintained against a town, or other quasi corporation, for a neglect of corporate duty, unless such action be given by statute: Riddle v. Proprietors of Locks of Canals, 7 Mass. 187; Mower v. Leisester, 9 Id. 247. "This rule of law, however, is of limited application. It is applied, in case of towns, only to the neglect or emission of a town to perform those duties which are imposed on all towns without their corporate assent, and exclusively for public purposes, and not to the neglect of those obligations which a town incurs when a special duty is imposed on it with its concent, express or implied, or a special authority is conferred on it at its request. In the latter cases, a town is subject to the same liabilities for the neglect of those special duties to which private corporations would be if the same duties were imposed or the same authority were conferred on them, including their liability for the wrongful neglect as well as the wrongful acts of their officers and agents:" Bigelow v. Randolph, 14 Gray 541.

Ohild v. Besten, 4 Allen 41, is a sace much in point, where it was held that sewers when constructed become the property of the city, and the duty of keeping them in repair develves on the city; and the city is responsible for negligently suffering them to consider a missace to the estates of the citiesne where private drains

enter into them, if the nuisance does not result from their original plan of construction, and could be avoided by keeping them in proper condition. The plaintiff's drain entered the defendants' common sewer, which had its outlet in the south bay at the depth of some feet below high water. By means of a waste-weir, the sewer was constructed to discharge into the empty basin in the back bay when the ontiet into the south bay was closed by the tide, and the water in the sewer had risen high enough to reach the waste-weir. proprietors filled in against the sewer in the back bay, thereby preventing the discharge through the waste-weir, and the plaintiff's premises were flowed in consequence. HOAR, J., remarked: "Here a special authority was conferred and accepted, involving important relations to individual proprietors of land, and entire control of an easement of such a nature that negligence might. not only deprive those interested of a benefit which it was designed to afford, and for which they had paid, but produce consequences actively and directly pernicious. The duty to keep the sewer free from obstructions was a ministerial duty, and the defendants were liable for negligence in its exercise to any person to whom their negligence occasioned an injury."

Judge Cooley, in his work on Constitutional Limitations, page 248, eays: "The grant by the state to the municipality of a portion of its severeign powers, and their acceptance for these beneficial purposes, is regarded as raising an implied promise on the part of the corporation to perform the corporate duties; and this implied contract, made with the severeign power, enures to the benefit of every individual interested in its performance. In this respect these corporations are looked upon as occupying the same position as private corporations, which, having accepted a valuable franchise on condition of the performance of certain public duties, are held to centract, by the acceptance, for the performance of these duties." The authorities are very unanimous in support of this destrine, and are cited on page 248 of Judge Cooley's work.

As to the second and third questions raised by the defendants, the rule in such saces is stated in Rochester White Load Co. v. Rochester, 3 N. Y. 468, to be, that "a city is bound to exercise that care and prudence which a discreet and cautious individual would or eight to use if the whole loss or risk were to be his alone." In Hume v. The Mayor, fe., of New York, 47 N. Y. 689, it is said:
"The city authorities are not bound to be experts, or skilled in

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mechanics and architecture, and can only be held to the extent of reasonable intelligence and ordinary care and prudence:" Reckwood v. Wilson, 11 Cush. 221. In Johnson v. Haverkill, 85 N. II. 74, which was an action against the town for an injury resulting from an alleged defect in a highway, it was held that the question of negligence on the part of the town does not arise except incidentally, as it is involved in the question whether the defect exists, and this latter question may depend upon the manner in which the defect originated, and the circumstances of its continunnee. In such case the question of negligence is a material inquiry. And where an obstruction exists by reason of inevitable accident, without fault or negligence on the part of any person, it is not an obstruction within the meaning of the statute, unless the town had notice of it, express or implied, and reasonable opportunity, by the exercise of proper care and vigilance, to have removed it before the accident occurred. It is well settled, that a municipal corporation is not liable for injuries caused to individuals by obstructions on the highway not placed there by its own efficials or by authority of the city government, until after actual notice of their existence, or until, by reason of the lapse of time, it should have had knowledge, and therefore actual notice may be presumed: Hume v. New York, 47 N. Y. 646; Colley v. Westbrook, 57 Me. 181; Hunt v. Brooklyn, 85 Barb. 220; Cooley, page 249.

The case does not show that the referee did not apply these rules in weighing the evidence laid before him, and in coming to the conclusion which he reached. We cannot say, as matter of law, from the facts presented by the report, that the defendants did act with the care and prudence that a discreet and cautious individual would if the whole loss or risk were to be borne by him alone. There is evidence tending to show that the thing which caused the obstruction in the sewer had been there for such a length of time that notice to the defendants must be presumed. But these were questions of fact, to be found by the referee according to the particular circumstances of this case: Johnson v. Haverhill, supre; and it is to be presumed, in the absence of any evidence to the contrary, that he applied the law correctly to the facts.

CUSHING, C. J.—The case of Bastman v. Meredith was very slaborately and carefully considered by the late Chief Justice PERLEY. From that case, and the authorities eited by my brother SMITE, it seems to me well established that this is one of that clara

of cases in which a corporation would be liable at common law for a neglect of its duty.

Some question has been made in the argument about the sufficiency of the notice to the city of the defect in the sewer, and it is claimed that the city marshal was not the proper officer to receive the notice. In the case of Howe v. Plainfield, 41 N. H. 185, which was an action for damages occasioned by a defect in a highway, the defendants offered to show that the selectmen had no notice of the defect. The testimony was excluded, and it was held to have been rightly excluded, the court putting the matter upon the ground that, if the defect had existed for a sufficient length of time to give reasonable opportunity to ascertain and repair it, the town was liable, whether the selectmen had notice, express or implied, of its existence or not. The true theory of the law seems to be, that, in matters of this kind, every corporator ought to interest himself in taking notice of defects and bringing them to the knowledge of the authorities, and that whenever the jury is in condition to say that the corporation ought to have taken notice, it will be held liable. I think we must infer that the referee found, from the notice to the city marshal, which tended to give notoriety, from the length of time which had elapsed, and from all the circumstances, that the defendants had been guilty of neglect. I think, therefore, there should be judgment for the plaintiff on the report.

LADD, J.—I, also, think there should be judgment on the report for the plaintiff. Certain facts were reported by the referee, for what purpose does not very clearly appear, and judgment was rendered by the court below for the plaintiff in accordance with the general finding of the referee. The defendants excepted to the order for judgment against them. I understand the ground they take to be, first, that there was no evidence from which the referee could legally find that the damage was caused by any want of reasonable and ordinary care on the part of the city with respect to the sewer; and, second, that if there was such evidence, still they are not liable, according to the destrine of Bastman v. Maredith, 36 N. H. 284.

The first position is certainly without foundation. It is entirely clear that there was evidence from which the referee might well find foult and negligence in the original construction of the

sewer, and negligence in not removing the obstruction before the injury bappened.

The second point is undoubtedly one of more intrinsic difficulty. The defendants were not bound by law to construct the sewer, and herein the case differs entirely from that of an injury caused by a defect in a highway. They were, however, authorized to construct it, and voluntarily undertook that service. The plaintiff's cellar was drained into the sewer "of right," as the case finds; so there is no pretence that her legal rights had been forfeited or impaired by her own act. It does not appear whether this right to drain her cellar into the common sewer was of such a character that she could compel the defendants to keep up the sewer for that purpose, nor whether the right was obtained by the payment of a reasonable sum to the city, as provided by Gen. Stats., ch 44, sec. 9; but, in the view I take of the case, neither of these things is material. It is material that she did not, without right, open her drain into the sewer.

As to the application of Eastman v. Meredith, it appears to me the cases are not parallel. There it was held, that where a building, erected by a town for a town house, was so imperfectly constructed that the flooring gave way at the annual town meeting, and an inhabitant and legal voter, in attendance on the meeting, received thereby a bodily injury, he could not maintain an action against the town to recover damages for the injury.

The decision was placed entirely on the peculiar nature of the obligation of a town to provide a safe place in which to hold town meetings. That duty is not imposed by statute, nor by contract. It is not an enterprise undertaken by the town for gain. It is at most a public or political duty, and the right of the citizen that it shall be properly performed is a public or political right.

The court say: "We regard the present case as one of new impression. We have heard of no earlier attempt in this state to maintain an action against a town for a private injury suffered by a citizen of the town from neglect of the town to provide him with safe and suitable means of exercising his public rights, and we are not informed of any case in which such an action has been maintained in any other state."

Nearly the whole of the elaborate opinion of the court is occupied You XXIV.—91

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with showing the distinctions between that case and cases bearing a very strong resemblance to the present.

The question, whether municipal corporations in this country and corporations in England having some of the powers and charged with some of the duties usually exercised by municipal corporations here, are liable for negligence, carelessness, or misfeasance, both in the performance of their legal duties and the doing of voluntary acts within the scope of their authority, has been much considered by the courts on both sides of the Atlantic; and the decided weight of modern authority is, that in this respect they stand like private individuals or corporations. The English cases on this subject are very thoroughly and carefully reviewed by Blackburn, J., in Mersey Docks Trustees v. Gibbs, Law Rop. 1 H. L. 98. That was an action against the Mersey Docks Board of Trustees, a corporation created by Act of Parliament, with power to build docks at Liverpool and secure dock rates, which rates they were bound by the statute to apply wholly to the maintenance of the docks and the payment of a very large debt contracted in making them. The plaintiff's vessel, while entering one of the docks, ran upon a bank of mud which had been suffered to accumulate at the entrance of the dock, and was damaged. It was held that the principle on which a private person, or a company, is liable for damages occasioned by the neglect of servants, applies to a corporation which has been entrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person or the company, are not applicable to the use of the individual corporators, or to that of the corporation, but are devoted ; to the maintenance of the works, and, in case of any surplus existing the tolls themselves are to be proportionately diminished. This case, decided in 1866, shows most clearly the state of the law in England on this point at the present time, and is very much in point.

There was evidence here from which the referee might find want of due care in the construction of the sewer, and that the damage

happened by reason thereof.

In The Mayer, fc., of New York v. Bailey, 2 Den. 488, it was bold that a municipal corporation is responsible for the negligence we unskilfulness of its agents and servants, when employed in the metruction of a work for the benefit of the city or town, subject

to the government of such corporation. The action was for injury occasioned by the negligent and unskilful construction of a dam on the Croton river, being part of the public works built pursuant to a statute for supplying the city with pure and whelesome water.

In Rochester White Lead Co. v. Rochester, 3 N. Y. 468, the corporation of the city of Rochester, having power to cause common sewers, drains, &c., to be made in any part of the city, directed a culvert to be built, for the purpose of conducting the water of a natural stream which had previously been the outlet through which the surface water of a portion of the city had been carried off. A freshet having occurred, the culvert, in consequence of its want of capacity and the unskilfulness of its construction, failed to discharge the waters, so that they were set back upon the factory of the plaintiffs, and injured their property situated Held, that the city corporation was liable for the damages. And the doctrine was laid down, that an ordinance of a city corporation, directing the construction of a work within the general scope of its powers, is a judicial act for which the corporation is not responsible; but the prosecution of the work is ministerial in its character, and the corporation wast therefore see that it is done in a safe and skilful manner.

There was also, in the present case, as already suggested, evidence from which the referee might find negligence in not removing the obstruction from the sewer before the injury courred; and my opinion is, that this also furnishes legal ground upon which the award of the referee should be sustained.

The case of The Mayer, &c., of New York v. Furne, 2 Hill 612, is in point. It was there held that the corporation of the city of New York are bound to repair the sewers, &c., constructed by them; and if an inhabitant be injured by reason of their neglect in this particular, he may maintain an action against them for his damages.

Another strong case of the same description is Child v. Beston, 4 Allen 41, where the city was held responsible for negligently suffering the common sewers to occasion a nuisance in the estates of the citizens whose private drains enter into them. A large number of cases bearing in the same direction may be found in Sheepman & Redfield on Negligence, sects. 120, 144, 151, 579.

The point as to want of due care and skill in the original con-

struction was decided by this court in the recent case of Gilman v. Laconia, 55 N. II. 180.

I think the defendants were bound to the exercise of ordinary care and skill, both in constructing and maintaining the sewer, and that for any injury which happens to the estate of a citizen from a failure in that respect, they are responsible.

Judgment on the report for the plaintiff.

Supreme Court of the United States.

NEW YORK LIFE INS. CO. F. WILLIAM C. STATHAM BY AL.
THE SAME F. CHARLOTTE SEYMS.
MANHATTAN LIFE INS. CO. F. R. S. BUCK, EXECUTOR.

A policy of life insurance which stipulates for the payment of an annual premiem by the awared, with a condition to be void on non-payment, is not an insurance from year to year, like a common fire policy; but the premiume constitute an annuity, the whole of which is the consideration for the entire assurance for life; and the condition is a condition subsequent, making void the policy by its non-performance.

But the time of payment in such policies is material, and of the assumes of the contract; and failure to pay involves an absolute ferfeiture, which cannot be relieved against in equity.

If failure to pay the annual premium be caused by the intervention of war between the territories in which the insurance company and the assertd respectively reside, which makes it unlawful for them to hold interseurse, the policy is nevertheless ferfeited if the company invist on the condition; but in such case the assured is entitled to the equitable value of the policy arising from the premiume notually paid.

This equitable value is the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfolded policy when the forfaire covered, and may be recovered in an action at law or suit in equity.

The destrine of revival of contracts, suspended during the war, is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive—as where time is of the contract of the contract, or the parties cannot be made equal.

The average rate of mortality is the fundamental basis of life assurance, and as this is subverted by giving to the assured the option to revive their policies or not after they have been suspended by war (since none but the sick and dying would apply), it would be enject to compal a revival against the company.

On appeal and in error from the Circuit Court of the United States for the Southern District of Mississippi.

The first of those cases was a bill in equity filed to recover the amount of a policy of life assurance, granted by the defendants (new

plaintiffs in error) in 1851, on the life of Dr. A. D. Statham, of Mississippi, from the proceeds of certain funds belonging to the defendants attached in the hands of their agent at Jackson, in that state. It appeared from the statements of the bill that the annual premiums accruing on the policy were all regularly paid until the breaking out of the late civil war; but that, in consequence of that event, the premium due on the 8th of December 1861 was not paid; the parties assured being residents of Mississippi and the defendants a corporation of New York. Dr. Statham died in July 1862.

The second case was an action at law brought in the same court against the same defendants to recover the amount of a policy is sued in 1850 on the life of one Henry S. Seyms, the husband of the plaintiff. In this case also the premiums had been paid until the breaking out of the war, when by reason thereof they coased to be paid, the plaintiff and her husband being residents of Mississippii Seyms died in May 1862.

The third case was a similar action at law brought in the same court against the Manhattan Life Insurance Company of New York to recover the amount of a policy issued by them in 1858 on the life of C. L. Buck, of Vicksburg, Mississippi; the circumstances being substantially the same as in the other cases.

The policies in all the cases were in the usual form of such instruments, declaring that the company, in consideration of a certain specified sum to them in hand paid by the assured, and of an annual premium of the same amount to be paid on the same day and month in every year during the continuance of the policy, did assure the life of the party named, in a specified amount, for the term of his natural life. The policies contained various conditions upon the breach of which they were to be null and void; and amongst others the following: "that in case the said [assured] shall not pay the said premium on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable to the payment of the sum insured, or in any part thereof, and this policy shall cease and determine." The Manhattan policy contained the additional provision, that in every case where the policy should coase or become null and roid, all previous payments made thereen should be for-Sited to the company.

. The non-payment of the premiums in arrest was set up in ber

of the actions, and the plaintiffs respectively relied on the existence of the war as an excuse, offering to deduct the premiums in arrear . from the amounts of the policies.

The opinion of the court was delivered by

BRADLEY, J.—We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiuma. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the considerstion for insurance during the next following year—as in fire-policles. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the belance of the life insured, without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread ever the whole life. The value of assurance for one year of a man's life when he is young, strong, and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance from the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole incursace.

But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protesting themselves from embarrasement. Unless it

} ė were enforceable the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off approfitable members or the success of the whole scheme is cadengered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the co-existence of many risks arises the law of average which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality and of prompt payments and compound interest thereon. Delinquency cannot be telerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business. Some companies, it is true, accord a grace of thirty days, or other fixed period, within which the premium in arrear may be paid on certain conditions of continued good bealth, &c. But this is a matter of stipulation, or of discretion on the past of the particular company. When no stipulation exists it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is in extremis to meet a premium coming due, demonstrate the common view of this matter.

The case therefore is one in which time is material and of the essence of the centract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their even negligence.

But the court below bases its decision on the assumption that when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they over been known to take place in the case of executory contracts in which time is unsterial? If a Texas merchant had contracted to furnish some northern explaces.

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a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed in 1860 to furnish during the two following years ten thousand cubic feet of marble for the construction of a building in Cincinnati, could be have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?

The truth is, that the doctrine of the revival of contracts, suspended during the war, is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Anything that interferes with it, deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the back premiums should be paid, the companice would have the benefit of this average amount of risk. But the good risks are never heard from; only the bad are sought to be revived—where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of the bad cases, whilst the company necessarily lose the cases which are desirable, would be manifestly unjust. An insured person, as before stated, does not stand isolated and alone. . His case is connected with and co-related to the cases of all others insured by the same company. The nature of the business as a whole must be looked at to understand the general equities of the parties.

We are of opinion, therefore, that an action cannot be maintained for the amount assured on the policy of life insurance forfeited (like these in question) by non-payment of the premium, even though the payment was prevented by the existence of the

The question then arises, must the insured lose all the money which has been paid for premiums on their respective policies? If they must, they will sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush it seems manifest that justice requires that' they should have some compensation or return for the money already paid, otherwise the companies would be the gainers from their loss; and that from a cause for which neither party is to blame. The case may be illustrated thus. Suppose an inhabitant of Georgia had bargained for a house situated in a northern city, to be paid for by instalments, and no title to be made until all the instalments were paid; with a condition that on the failure to pay any of the instalments when due, the contract should be at an end and the previous payments forfeited; and suppose that this condition was declared by the parties to be absolute and the time of payment material. Now if some of the instalments were paid before the war, and others accruing during the war were not paid, the contract, as an executory one, was at an end. If the necessities of the render obliged him to avail himself of the condition and to re-sell the property to another party, would it be just for him to retain the money he had received? Perhaps it might be just if the failure to pay had been voluntary, or could, by possibility, have been avoided. But it was caused by an event beyond the control of either party-an event which made it unlawful to pay. In such case, whilst'it would be unjust, after the war, to enforce the contract as an executory one against the vendor, contrary to his will; it would be equally unjust in him, treating it as ended to insist upon the forfeiture of the money already paid on it. equitable right to some compensation or return for previous payments would clearly result from the circumstances of the case. The money paid by the purchaser, subject to the value of any possession which he may have enjoyed, should as aque et bene be returned to him. This would clearly be demanded by justice and right.

And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-narment: they cannot with any fairness insist upon the case.

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dition as it regards the forfeiture of the premiums already paid. That would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence. In other words, he is fairly entitled to have the equitable value of his policy.

As before suggested, the annual premiums are not the consideration of assurance for the year in which they are severally paid, for they are equal in amount; whereas, the risk in the early years of life is much less than in the later. It is common knowledge that the annual premiums are increased with the age of the person applying for insurance. According to approved tables, a person becoming insured at twenty-five is charged about twenty dollars annual premium on a policy of \$1000; whilst a person at fortyfive is charged about thirty-eight dollars. It is evident, therefore, that when the younger person arrives at forty-five, his policy has become (by reason of his previous payments) of considerable value. Instead of having to pay, for the balance of his life, thirty-eight dollars per annum, as he would if he took out a new policy on which nothing had been paid, he has only to pay twenty dollars. The difference (eighteen dollars per annum during his life) is called the equitable value of his policy. The present value of the assurance on his life exceeds by this amount what he has yet to pay. Indeed, the company, if well managed, has laid aside and invested a recerve fund equal to this equitable value, to be appropriated to the payment of his policy when it falls due. This reserve fund has grown out of the premiums already paid. It belongs, in one sense, to the insured who has paid them, somewhat as a deposit in a savings bank is said to belong to the person who made the deposit. Indeed, some life-insurance companies have a standing regulation by which they agree to pay to any person insured the equitable value of his policy whenever he wishes it. . words, it is due on demand. But whether thus demandable or not, the policy has a real value corresponding to it-a value on which the holder often realizes money by borrowing. The careful capitalist does not fail to see that the present value of the amount assured exceeds the present value of the annuity or annual premium yet to be paid by the assured party. The present value of the amount secured is exactly represented by the annuity which would have to be paid on a new policy; or, thirty-eight dollars per

annum in the case supposed, where the party is forty-five years old; whilst the present value of the premiums yet to be paid an a policy taken by the same person at twenty-five is but little more than half that amount. To forfeit this excess, which fairly belongs to the assured, and is fairly due from the company, and which the latter actually has in its coffers, and to do this for a cause beyond individual control, would be rank injustice. It would be taking away from the assured that which had already become substantially his property. It would be contrary to the maxim, that no one should be made rich by making another poor.

We are of opinion, therefore, first, that as the companies elected to insist upon the condition in these cases, the policies in question must be regarded as extinguished by the non-payment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon.

Secondly, that such failure being caused by a public war, without the fault of the assured, they are entitled es aque et ione to recover the equitable value of the policies with interest from the close of the war.

It results from these conclusions that the several judgments and decrees in the cases before us, being in favor of the plaintiffs for the whole sum assured, must be reversed, and the records remanded for further proceedings. We perceive that the declarations in the actions at law contain no common or other counts applicable to the kind of relief which, according to our decision, the plaintiffs are entitled to demand; but as the question is one of first impression, in which the parties were necessarily somewhat in the dark with regard to their precise rights and remedies, we think it fair and just that they should be allowed to amend their pleadings. In the equitable suit perhaps the prayer for alternative relief might be sufficient to sustain a propor decree; but nevertheless the complainants should be allowed to amend their bill if they shall be so advised.

In estimating the equitable value of a policy no deduction should be made from the precise amount which the calculations give, as is sometimes done where policies are voluntarily surrendered, for the purpose of discouraging such surrenders; and the value should be taken as of the day when the first default occurred in the payment of the premium by which the policy became forbited. In

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each case the rates of mortality and interest used in the tables of the company will form the basis of the calculation.

The decree in the equity suit and the judgment in the actions at law are reversed, and the causes respectively remanded, to be proceeded in according to law and the directions of this opinion.

WAITE, Ch. J.—I agree with the majority of the court in the opinion that the decree and judgments in these cases should be reversed, and that the failure to pay the annual premiums as they matured put an end to the policies, notwithstanding the default was occasioned by the war, but I do not think that a default, even under such circumstances, raises an implied promise by the company to pay the assured what his policy was equitably worth at the time. I, therefore, dissent from that part of the judgment just announced, which remands the causes for trial upon such a promise.

STRONG, J.—While I concur in a reversal of these judgments and the decree, I dissent entirely from the opinion filed by a majority of the court. I cannot construe the policies as the majority have construct them. A policy of life insurance is a peculiar contract. Its obligations are unilateral. It contains poundertaking of the assured to pay premiums. It merely gives him as option to pay or not, and thus to continue the obligation of the insurers or terminate it at his pleasure. It follows that the consideration for the assumption of the insurers can in no sense be considered an annuity consisting of the annual premiums. In my epinion the true meaning of the contract is that the applicant for insurance, by paying the first premium, obtains an insurance for one year, together with a right to have the insurance continued from year to year during his life, upon payment of the same annual premium, if paid in advance. Whether he will avail himself of the refusal offered by the insurers or not, is optional with him. The payment ad diem of the second or any subsequent premium is, therefore, a condition precedent to continued liability of the insurers. The assured may perform it or not at his option. In such a case the dectrine that accident, inevitable necessity, or the act of God may excuse performance, has no existence. It is for this reason that I think the policies upon which these suits were brought were not in force after the assured ceased to pay pre-And an shough for asher receive the majority of the

court holds, but they hold at the same time that the assured in each case is entitled to recover the surrender, or what they call the equitable value of the policy. This is incomprehensible to me. I think it has never before been decided that the surrender value of a policy can be recovered by an assured unless there has been an agreement between the parties for a surrender, and certainly it has not before been decided that a supervening state of war makes a contract between private parties, or raises an implication of one.

CLIFFORD, J., dissenting.—Where the parties to an executory money contract live in different countries and the governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the war and revives when peace cusues; and that rule, in my judgment, is as applicable to the contract of life insurance as to any other executory contract. Consequently I am obliged to dissent from the opinion and judgment of the court in these cases.

HUNT, J., concurred in this dissent.

Supreme Court of Missouri.

IRON MOUNTAIN BANK v. DAVID H. ARMSTRONG.

Courts do not possess the power to change by instructions the issues which the pleadings present.

An instruction that the jury may disregard the testimony of a witness who has sworn falsely, concerning any material fact in issue, should not be given. They cannot reject his evidence unless they believe that he has knowingly testified to an naturals.

It is not competent, in order to show that a party to a note in suit has authorized the insertion of a clause respecting interest, to show that he was a party to other notes containing similar clauses.

A witness cannot be questioned in regard to importinent matter in order to contradict him.

In suit against the endorser on a promissory note, the defence being an unantherized alteration, is appeared that in the bottom line, at the end of the note, was the printed form "for value received" without a printed black following it, in which to insert rate of interest (as, e. g., " with interest from —— at the rate of —— per cent. per annum"); but that in the blank space, commencing on the line with and directly following the words " value received," and running obliquely upward to avoid the rignature, were written, after the paper left defendant's hands, the words " with interest at the rate of tax per cent. per annum after unstarity." Nothing in the color of the lak used in the inserted clause would runlify exists

suspicion. It was held that, elthough the note did not present a glaring case of alteration, yet enough appeared to authorize the court under appropriate instructions to leave to the jury the question whether the note was altered in such a manner as to put the plaintiff on inquiry at the time of his purchase.

In a case where a note, framed on a printed blank, was complete at the time it left the hands of the party sought to be charged, but was so printed as to give an apparent authority to fill a blank space occupying the same position relative to the body of the note that an interest clause usually does, and the space left furnished ample room for inserting such clause, and the space was not filled in a way to astront observation, the court strongly inclined to the opinion that the defendant would be bound to an impocent holder.

APPEAL from St. Louis Circuit Court.

This was a suit on a promissory note, against Armstrong as endorser. This note was in the usual form on a printed blank, and contained at the end the words "with interest at 10 per cent. after maturity." These words were written in the blank space after the printed words "value received," and were somewhat slanted upwards towards the right hand of the paper, apparently to avoid interference with the signature of the maker of the note. The defendant's answer alleged that these words were subsequently to his endorsement, and when the instrument was completed, inserted without his knowledge, consent or authority. The answer also contained the statutory general denial, as to dishonor, notice, ite.

There was a verdict for the plaintiff and judgment, which, however, was reversed at the general term. From this reversal the plaintiff appealed.

Slayback & Haeuseler, for appellant, cited Putnam v. Sullivan, 4 Mass. 45; Zimmerman v. Rote, 75 Penna. St. 188; Nebecker v. Cockrene, 48 Ind. 486; Ritter v. Singmaster, 78 Penna. St. 400; 7 Mo. 281; Redlick v. Doll, 54 N. Y. 284; Rainbolt v. Eddy, 34 Iowa 440; Garrad v. Hadden, 67 Penna. St. 82; 48 Vt. 875; 58 Mo. 516; 54 Id. 77; Whittemore v. Obear, 58 Id. 286, 287; Gardiner v. Harback, 21 Ill. 180-81; Workman v. Campboll, 57 Mo. 58-55; Speake v. United States, 9 Cranch. 29; Smith v. Crooker, 5 Mass. 540; Bolt v. Dunsterville, 4 T. R. 818; Barrington v. Bank of Washington, 14 S. & R. 405; Stahl v. Berger et al., 10 Id. 170-78; Shirts v. Overjohn, 60 Mo. 805; Weelfelk v. Bank of America, 10 Bush; Pholan v. Mess, 67 Penna. St. 50; Stedman et al v. Boone, 49 Ind.; Bank of Salina v. Babeock, 21 Wend. 499; Sandweky v. Seeville, 24, Id. 116.

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Dryden & Dryden, for respondents.

The opinion of the court was delivered by

SHERWOOD, J.—In conformity with our previous ruling in the case of Armstrong v. Capital Bank, at this term, inasmuch as there was no issue made by the pleadings as to subsequent ratification by Armstrong of the alleged alteration, the third instruction given at plaintiff's instance must be held erroneous. It manifestly diverted the attention of the jury from that which was, to that which was not, in issue, thus defeating the very object which the law has in contemplation when requiring pleadings to be filed; and a court does not possess the power to change by instructions the issues which the pleadings present: Moffat v. Conklin, 35 Mo. 458; Camp v. Heelan, 48 Id. 591.

Our statute (Wagn. Stat. 1040, § 11) defines a trial as "the judicial examination of the issue between the parties." Now, it is obvious, that a trial must fail in accomplishing its statutory purpose, when diverted to the examination of matters dehere the record and foreign to the issues.

The second instruction on behalf of the plaintiff was to the effect that if the interest clause was inserted, either before or after Armstrong's endorsement, and with his consent, this would warrant a finding in favor of the plaintiff. The serious objection to this instruction is, that while it may be correct as far as it goes, it is altogether too narrow in its scope. The other allegations of the petition, put in issue by the answer, as to whether the bank was the holder of the note, as to the presentation of the note for payment, as to its dishonor, as to notice to defendants, &c., are entirely ignored and lost sight of. And yet all these were controverted facts; all necessary to be proven in order to a recovery. And this lack in the instruction was not supplied by any others. The instruction therefore was clearly violative of the principle so often asserted by this court, that an instruction is erroneous which singles out certain facts and directs a verdict if they are found, regardless of other facts at issue: Hines v. McKinney, 3 Mo. 383; Sigeroon v. Pomroy, 18 Id. 620; Clark v. Hammeric, 27 Id. 55; Mead v. Brotherton, 80 Id. 201. Instructions are equally faulty whether enlarging or restricting the issues.

The first instruction asked and given for the plaintiff, that " if the jary believe from the evidence that any witness has sworn

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falsely in regard to any material fact in issue, they are at liberty to disregard his entire evidence," should have been given, if given et all, in a different shape from that in which it was asked. It is not true as a legal proposition, that because a witness has honestly testified to that which is in point of fact untrue, therefore the jury may reject the whole of his testimony. It is only where a witness has knowingly testified to an untruth, that an instruction of this character should be given: Paulette v. Brown, 40 Mo. 52, and cases cited. The instruction, however, in the case before us even if properly worded, would appear to have had little, if anything, whereon to base it. It is certain that such an instruction should not be given in the ordinary routine of jury trials; and merely because there happens to be a conflict of testimony, such conflict by no means implies dishonesty of motive. The best citisens of the country, when called to the witness stand, frequently differ in their versions of the same facts; but yet this alone should furnish no basis for impagning their purity of purpose, or denouncing them as wholly unworthy of belief.

The fourth instruction asked by defendant should have been given. The simple fact that the defendant was the endorser of four other promissory notes, containing interest clauses, did not tend in the slightest degree to show that he had authorised the insertion of a clause respecting interest in the note in suit. These notes should not have been admitted, or if improvidently admitted should have been excluded, as asked by the instruction referred to; for it is a rudimentary principle "that the evidence must correspond with the allegations and be confined to the point in issue:" 1 Greenl. Ev., §§ 50, 51, 52, 448. Were the rule otherwise, litigation would be interminable, by reason of the introduction of collateral issues. This evidence was received very doubtingly by the trial court; but we think it should have been, for the reasons given, altogether rejected; and it certainly could not be received for the purpose of discrediting Armstrong, who had been interrogated on the subject. A witness cannot be questioned as to an importinent matter in order to contradict him: Harper v. I. & St. L. Railroad Company, 47 Mo. 567; 1 Greenl. Ev., § 449.

In reference to the note in suit, the evidence tended to show that at the time of its transfer to plaintiff, it was in the same condition as now, and there was nothing impeaching the bone fides of such transfer. It was shown, however, on the part of the defend-

ant, that after his endorsement was made and the note redelivered to Murdock, the maker, the interest clause was inserted in the absence and without the authority of Armstrong, by the book-keeper of Murdock, at the instance of the latter. The clause respecting interest is in the same handwriting as the body of the note, all having been written by the book-keeper, who testified that after the note had been signed by Murdock & Dickson and endersed by Armstrong, witness wrote the words mentioned in an oblique direction in order to avoid writing over the "D" in the name of Dickson. The original note is before us, and although there was some variance of opinion as to whether the words in question were written with different ink, we have been able to discover, in regard to any difference in the color of the ink employed, nothing which would readily excite observation. This note does not present a glaring case of alteration like that in the case of The Capital Bank, above referred to, for there the alteration was in ink of a different color; was in short, an interlineation patent to even casual observation. If the note, although complete at the time it lest Armstrong's hands, had been so loosely filled, in respect of the principal sum mentioned therein, as to easily admit of enlarging the liability already imposed by the instrument, and in a manner calculated to baffle prudence in its ordinary manifestations, no hesitancy would be felt in asserting, in accordance with our more · recent adjudications, the undoubted liability of the endorser to an innocent purchaser.

And the same line of remark we regard as applicable in the present instance. If the instrument was really complete, but was so carelessly printed as to give an apparent authority to fill a blank space, occupying the same relative position to the body of the note that an interest clause usually does, we strongly incline to the opinion that if this space furnished ample room, and was not filled in a way to attract observation, the endorser would be bound to an innocent holder. And in either of the esses instanced, the matter is for the jury under appropriate instructions. The blank now under consideration is unquestionably not an ordinary interest blank, which is usually printed thus, "with interest from—at—per cent. per annum." If there was such a blank here, it would carry on its face, so far as concerns an innocent purchaser, conclusive authority for filling the spaces thus left, regardless of

the fact whether such spaces were filled with the adroitness incident to practised penmanship or otherwise, and bence no difficulty would be experienced in the proper disposition to be made of the point. If the space left had, in lieu of the words it now contains, been filled with these, " and one hundred dollars additional after maturity," no one would doubt that the purchase of such an instrument could not be sanctioned without at once breaking down all existing barriers between negligence on the one hand and circumspection on the other. But there would seem to exist a certain degree of appositeness in the insertion of words in the usual place allotted to them, of the same import as those constituting the alleged alteration, when no degree of appositeness could be affirmed of words of the tenor and effect used above, by way of illustrating an extreme case. And the reason for distinguishing the real from the hypothetical case must be obvious. In the latter, the insertion in an anusual place of unaccustomed words should give the alarm to prudence, and put caution on the alert. But in the former case it would scarcely seem probable that apprehension should be awakened by inserting words which accompany as a usual incident those which compose the body of the note, if such words are appawently inserted contemporaneously with the residue of the written words of the note, and not in a manner provocative of inquiry.

These considerations induce the belief before expressed, that the matter of the alteration of the note, and as to whether, if altered, it was done in such manner as to challenge investigation, when purchased by the bank, can be appropriately committed to the triers of the facts, with proper instructions. The same may be said respecting the question of ratification, in relation to which we refer to our recent decisions of Evans v. Foreman (decided at our last term at St. Joseph) and German Bank v. Dunn, decided at the present term, and also to the following authorities, enunciating the same doctrine: 2 Green! Ev., § 66; Story Agency, 8 ed., §§ 289, 445, and notes; Paley Agency (by Dunlap) 171, and cases cited; 1 Parsons Cont. 101.

For these reasons the judgment of general term, reversing that of special term, is affirmed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.³
SUPREME COURT COMMISSION OF OHIO.³
SUPREME COURT OF VERMONT.³

ACENT.

Protection given to Parties dealing with.—Persons dealing with au agent are entitled to the same protection as if dealing with the principal, to the extent that the agent acts within the scope of his authority; Angle v. Life Ins. Co., S. C. U. S. Oct. Term 1876.

Pursuant to this rule, it is settled law that where a party to a sugotiable instrument intrusts it to another for use as such, with blanks not filled up, such instrument, so delivered, carries on its face an implied authority to complete the same by filling up the blanks; but the authority implied from the existence of the blanks would not authorize the person intrusted with the instrument to vary or alter the material terms of the instrument by crasing what is written or printed as part of the same, nor to pervert the scope and meaning of the same by filling the blanks with stipulations repugnant to what was plainly and electly expressed in the instrument before it was so delivered: Id.

BANKRUPTCY.

Discharge not impeachable collaterally.—Under the present bankrupt law of the United States, the discharge of a bankrupt can be set soide for fraud in obtaining it, only by a direct proceeding for that purpose, pursuant to the provisions of its thirty-fourth section. It cannot be bollaterally impeached, on the ground that it was fraudulently or improperly obtained: Smith v. Ramsey, 27 Ohio St.

BILLS AND NOTES. See Agent.

Given for Pulent-Right, and Transferred in Payment for Liquer soil in Violation of Law.—The omission to insert in a note given for a patent-right," as required by statute, does not render the note void. If the patent-right is good and valid, and forms an adequate consideration for the note, the maker expected against a transferse of the note on the ground of the emission of those words. The object of the statute was to prevent the transfer of such notes to innocent and bond-fide holders: Street v. Wangh, 48 Vt.

Nor can the maker defend upon the ground that the plaintiff received the note from another transferes in payment for liquor sold in violation of law: Id.

CONFEDERATE NOTES. See Executor.

CONFLICT OF LAWS. See Debter and Creditor.

Prepared expressly for the American Law Register, from the original epinions. The cases will probably be reported in 2 or 8 Otto.

² From R. L. De Witt, Feq., Reporter; to appear in 27 Ohio St. Reports.

^{*} From Hon. J. W. Rowell, Reporter; to appear in 48 Vermont Reports.

CONSTITUTIONAL LAW. Soc Removal of Causes.

Regulation of Commerce—State Statutes amounting to—Police Regulations—Tux on Presengers or Ship-owners bringing them.—The case of The City of New York v. Miln, 11 Peters 108, decided no more than that the requirement from the master of a vessel of a catalogue of his passengers landed in the city, rendered to the mayor on eath, with a correct description of their names, ages, occupations, places of birth, and of last logal settlement, was a police regulation within the power of the state to exact, and not inconsistent with the Constitution of the United States: Henderson v. Wickham, Mayor of the City of New York; and Commissioners of Immigration v. North German Lloyd, S. C. U. S. Oct. Term 1875.

The result of the Passenger Cases, 7 Howard 288, was to hold that a tax demanded of the master or owner of the vessel for every such passenger, was a regulation of commerce by the state, in conflict with the Constitution and laws of the United States, and therefore void: Id.

Those cases criticised, and the weight due to them as authority con-

sidered: Id.

In whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect: Id.

Hence a statute which imposes a burdensome and almost impossible condition on the ship-master, as a prerequisite to his landing his passengers, with an alternative payment of a small sum of money for each one of them, is in fact a tax on the ship-owner for the right to land such passengers, and in effect on the passenger himself, since the ship-master makes him pay it in advance as part of his fare: Id.

Such a statute of a state is a regulation of commerce, and when applied to passengers from foreign countries, is a regulation of commerce

with foreign nations: Id.

It is no answer to the charge that such regulation of commerce by a state is forbidden by the constitution, to say that it falls within the police power of the states, for to whatever class of legislative powers it may bolong, it is prohibited to the states, if granted exclusively to Congress by that instrument: Id.

Though it be conceded that there is a class of legislation which may affect commerce, both with foreign nations and between the states, in regard to which the laws of the states may be valid, in the absence of action under the authority of Congress on the same subject, this can have no reference to matters which are in their nature national, or which

admit of a uniform system or plan of regulation: Id.

The statutes of New York and Louisiana, here under consideration, are intended to regulate commercial matters which are not only of national but of international concern, and which are also best regulated by one uniform rule, applicable alike to all the sea-ports of the United States. These statutes are therefore veid, because legislation on the subjects which they cover is confided exclusively to Congress by the clause of the constitution which gives to that body the "right to regulate commerce with foreign nations:" Id.

The constitutional objection to this tax on the passenger is not removed because the penalty for failure to pay does not accrue until twenty-four hours after he is landed. The penalty is incurred by the set of landing him without payment, and is, in fact, for the act of bringing him into the state: Id.

This court does not, in this case, undertake to decide whether or not a state may, in the absence of all legislation by Congress on the same subject, pass a statute strictly limited to defending itself against paupers, convicted criminals, and others of that class, but is of epision that to Congress rightfully and appropriately belongs the power of legislating on the whole subject: Id.

Regulation of Commerce—State Statutes—Taxing Immigration.—The statute of California, which is the subject of consideration in this case, does not require a bond for every passenger, or commutation in money, as do the statutes of New York and Louisiana, referred to in Henderson v. Wickham (supra), but only for certain enumerated classes, among which are "lowd and debauched women:" Chy Lung v. Freeman, S. O. U. S. Oct. Term 1875.

But the features of the statute are such as to show very clearly that the purpose is to extert money from a large class of passengers, or to prevent their immigration to California altogether: Id.

The statute also operates directly on the passenger, for unless the master or ewner of the vessel gives an enerous bond for the future pretection of the state against the support of the passenger, or pays such sum as the Commissioner of Immigration chooses to exact, he is not permitted to land from the vessel: Id.

The powers which the commissioner is authorized to exercise under this statute are such as to bring the United States into conflict with foreign nations, and which can only belong to the Federal government:

If the right of the states to pees statutes to protect themselves in regard to the criminal, the pauper and the diseased foreigner leading within their borders, exists at all, it is limited to such laws as are absolutely necessary for that purpose, and this more police regulation cannot extend so far as to prevent or obstruct other classes of persons from the right to hold personal and commercial intercourse with the people of the United States: Id.

The statute of California in this respect extends for beyond the necessity in which the right is founded, if it exists at all, and invades the right of Congress to regulate commerce with foreign nations, and is therefore void: Id.

CORPORATION.

Poreign—Right to do business to Other State.—It is not contrary to the laws of Ohio, nor against public policy, in the present condition of her laws, for a foreign corporation, lawfully organized in a sister state, to do business in Ohio: Newburg Potroleum Co. v. Wesre, 27 Ohio St.

to do business in Ohio: Newbury Petroleum Co. v. Woore, 27 Ohio St. A foreign corporation, authorized by the laws of the state in which it was organized to do business in this state, may transact business in Ohio not inconsistent with Ohio laws; may one and be sued in our courts. Kl.

Persons entering into contract with such foreign corporation concerning property, or rights in property, appropriate to its business in Ohio, will be estopped, after dealing with sold corporation, recognizing by

their acts its validity and receiving the benefits of the contract, from denying the power of the corporation to make the contract, in an action en the contract: Id.

COVENANT. See Warranty.

DESTOR AND CREDITOR. See Husband and Wife.

Appointment of Debter as Administrator.—The principle that the appointment of a debter as administrator converts the debt into assets in his hands to be accounted for, does not apply to one who is only conditionally liable to the estate: Shields, Adm'r, v. Odell, Adm'r of Moore, 27 Obio 84.

• The appointment or administrator de bonés non, with the will samezed. of one who was surety on the bond of the previous executor, deer not make a debt due the estate from such executor assets in the hands of such administrator by reason of his suretyabip : .kd.

Assignment — Conflict of Laure, — An assignment of personal property and choses in action by an insolvent debtor for the benefit of creditors in conformity to the laws of the state of New York, where such debtor resided and did business, operates to transfer the right of action to recover asid choose in action to the assigned, and he may maintain an action so such assignee in the courts of this state, to collect the same, although said assignment, as authorized by the laws of New York, gives prefergood to certain of the creditors: Fuller v. Steiglitz. 27 Ohio 8t.

In case of such an assignment of choses in action, the law of the domicile of the assignor controls and determines what is a sufficient trans-

for to authorize the assignee to collect the same : Id.

The principles of comity between states will allow such assignee to maintain an action, in the courts of this state, against one of its citizens, to collect the same, notwithstanding such preferences, in the absence of any set-off or other defence to such action, or of any lies or charge against said claim under the laws of Ohio, by the debtor : Id.

DEED.

· Parel Evidence to vary—Construction.—When a general description In a grant is followed by a particular description, the particular description must govern; and if paral evidence of the situation, surroundings, and appoilations of the subject of the grant at the time of its execution, would tend to make the general description comprehend more, than the particular destription, it would tend to contradict the deed in its true spotrustion, and be inadmissible : Fletcher v. Clork, 48 Ys.

the demanded premises, and paral evidence to bring them within the general description was excluded: Id. In this case it was hold that the particular description did not embrace

... in the control of the Bulletin Domain. See Statute.

BETOFFEL Bee Corporation.

· ... Evidence. See Deed.

· Exceange.

* Invited Warrenty-Burden of Proof.-A warranty of title is implied in a contract of exchange, the same as in a contract of sale: Pulse v. John 4 YL

In case for deceitfully exchanging property with philatiff upon which enother had a lien, it was held not to rest upon plaintiff to show that he had no notice of the lien at the time of exchange: Id.

· EXECUTION. See Officer.

EXECUTOR. See Debtor and Oreditor.

Accountability of— When forced to receive Money controry to his wishes—Jurisdiction.—Where an executor was forced by a military power that he could not control, to receive a sum of money from one of the debtors of the estate, in Confederate money, and to pay it over to the receiver of the Confederate States, and he acted contrary to his wishes, he was excused from accountability for this amount: Rockhold v. Rockhold et al., S. C. U. S. Oct. Term 1875.

Such a case does not present a Federal question of which the Supreme Court of the United States can take jurisdiction: Id.

FOREIGN CORPORATION. See Corporation.

HUSBAND AND WIPS.

Settlement by Husband on Wife—Fraud on Creditors.—In order to defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do so supervene—the actiler purposing to throw the hazards of business in which he is about to engage upon others, instead of heacetly helding his means subject to the chance of those adverse results to which all business enterprises are liable: Smith et al. v. Vedges, Assignes, S. C. U. S. Oct. Term 1875.

LIMITATIONS, STATUTE OF.

Commencement of Running.—An ordinance of the city of Cincinnati, making an assessment for grading and paving a street, provided that the owners of lots on which the assessments were made should soverally pay the same within twenty days from the date of the ordinance, or he subject to the interest and penalty allowed thereon by law. Bold, that an action to enforce the lieu of such assessment against a lot, commenced more than six years after the date of the ordinance, but within six years after the expiration of said twenty days, is not barred by the Statute of Limitations! Reyholds et al. v. Green, 27 Ohio St.

MORTGAGE.

The generality of its language forms no objection to the validity of a mortgage. A mortgage of " the road and property" of a railroad company is sufficient: Wilson v. Boyce, S. C. U. S. Oct. Term 1875.

It is quite within the competency of a railroad company to mortgage its lands not used for its track or appurtenences. It might be decend prudent and judicious to raise money upon its collateral property rather than upon its road. It might lose its foreign lands and still be excessful as a railroad company. If it should lose its track it must at eace coase to exist: Id.

NATIONAL BANK.

Dealing in Stocks.—In the honest exercise of the power to compromise a doubtful debt ewing to a bank, it can hardly be doubted that stocks

may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an abtscipated loss. Buch a transaction would not amount to a dealing in stocks: National Bank v. Nat. Exchange Bank, S. C. U. S. October Term 1875.

OFFICER.

Trespector ab initio—Damages.—If an officer advertices property other than hay, grain, &c., taken in execution at one piace, for sale at another piace, and sells it accordingly, he thereby becomes a trespector ob initio, and liable for the full value of the property, notwithstanding he applies the proceeds of the sale upon the execution: Everts v. Burgess, 48 Yt.

PATENT. See Bills and Notes.

Wairer of Right—Constitutional Law.—The Supreme Court of the United States having decided (20 Wallace 445) that a statute of a state which requires a foreign insurance company, before transacting business in the state, to waive its right to remove suits in which it is a party from the courts of the state to the Federal courts, is repugnant to the Constitution and laws of the United States and therefore void—that decision will be followed, though not approved by this court: Railway Passenger Assurance Co. v. Pierce, 27 Obio St.

STATUTE. See Constitutional Law.

To Deregation of Common Right—Construction—Eminent Domain.—Statutes incorporating aqueduct companies, and granting rights of entry upon private property for the purpose of constructing the aqueducts, and such like statutes, are strongly derogatory of common right, and no cases should be brought within them except such as come within their terms by importative necessity. Thus, where a statute incorporating such a company provided for entry upon any land through which it might be necessary for the aqueduct to pass, it was held, in an action of trespess que, class., that the statute was no justification, it not sppearing that it was necessary to enter upon the locus in que: Farneworth v. Goodhus, 48 Vt.

WARRANTY. See Exchange.

Coverant equinet Ensumbrances and to defend Title.—The defendant conveyed lend to the plaintiff, with coverants against ensumbrances, and to defend the title conveyed. There was then existing a mortgage on the land made by a prior owner, and the holder of the mertgage afterward brought suit against the mortgager and both of the parties to this case, and obtained judgment subjecting the land to the payment of the mertgage. The land was sold on the judgment, and deeded to the purchaser, who thereupon obtained possession Subsequently, at the suit of the defendant, on error, the judgment was reversed: Helf—1. The eviction of the plaintiff, under the judgment on the mortgage, was a breach of the edvenants of warranty in the deed, and thereupon a right of action thereon account in favor of the plaintiff. 2. The subsequent reversal of the judgment did not affect the sale of the land and consequent eviction of the plaintiff, and did not deprive him of his right of action on the coverants of warranty: Smith v. Dison, 27 Ohio St.

INDEX.

ACCORD AND SATISFACTION.

1. C. purchased the defendant's millinery goods, and in part consideration thereof, agreed to pay the defendant's debt to the plaintiff. C. thereupon wrote the plaintiff that her husband proposed to give his note on six months for said debt, and the plaintiff replied, accepting the proposition. The note was never given, but C. made remittances to the plaintiff from time to time, to apply on said debt. Ilvid, a mere accord, and that the defendant was not thereby discharged from the balance of the debt. Rising v. Cuiunings, 88.

2. Waiver of a promise to pay the debt of another that is without consideration and within the Statute of Fraude, or refusal to receive such payment,

does not discharge the original debtor. M.

ACCOUNT. See Fraud, 1; Partherselp, 9.

ACKNOWLEDGMENT. See Damp, 8.

ACTION. See Asset, 6.

1. The real defendant who pays a judgment against a nominal party, afterwards vacated, may recover in his own name the mency so paid. Mann v. Dina Ins. Co., 246.

2. For malpractice by a physician, successive suits for secreting desi cannot be brought, but the recovery is once for all, and may embrace pre spective as well as accrued damages. Housell v. Goodrick, 200.

8. An action of assumpsit against parties jointly, falls if there is no evides of a joint Hability on their part. Mace v. Page, 188.

4. Joinder of parties is not necessary where there is no unity of counts.

Columbia Bridge Co. v. Grisse, 113.

5. In an action to recover a debt which the defendant agreed with a third party to pay the plaintiff, the defendant can show the restission of the agreement prior to the plaintiff's assent to the premise made in his favor. Triable v. Arother, 188.

4. In such case, the defendant is not estopped from setting up any def which he could have set up against the enforcement of the contract by the

other contracting party. M.

ACTS OF CONGRESS.

See Constitutional Law, St. 1769, 1846, July 9. See GOVERNMENT, S. See WAR, 4. 1061, July 18. 1863, March 12. See Captered and Abandoned Properti-1867, March 2. See BANKRUPTOT. See REMOVAL OF CATORS. 1967, May 2. See MATIONAL BARK, 1966, Pebruary 10. See Districts System. 1968, Jaiy 30. See Constitutional Law, L 1876, May 31. 1874, Revised S

Bee Courte, & Bort. 705. See Destricts Bringes. Sect. 3324.

See Withing & Sect. 5800.

ACTS OF CONGRESS.

See Buippine, J. 1874, June 25.

See REMOVAL OF CAUSES. 1975, March &

ADMIXISTRATOR. See Equity, 18; Executor; Pathent, 1.

ADMIRALTY. See Arrethation, 1.

L. Collini

I. In cases of collision, where there is a great conflict of testimony, the part must be governed chiefly by leading facts, if such exist in the case. The Great Republic, 373.

2. A large and fast-pailing steamer is bound to act cautiously when over-

taking a small and slow one. Id.

3. The burden is on the vessel neglecting the proper measures of precauion to show that the collision if one occurs did not occur through her neglect. K

4. The rule of navigation which requires " when sailing ships are mosting end en, or nearly so, the belies of both shall be put to port," is obligatory from the time that necessity for precaution begins, and continues to be Scable so long as the means and opportunity to avoid the danger remain. The Darier, 495.

3. The absence of a lookout is unimportant where his presence would have the materiarchie. Id.

done nothing to avert the entastrophe. Id.

6. A collision having occurred on a clear night between a steamship and sailing vessel, there having been some want of vigilance in the lookqut of the steamer, the steamship was hold to be exclusively responsible. The See

Gulf, 495.
7. Two steamers were held to be equally in fault for running at full speed. in a very dark and foggy night, after they had learned by signals from each other of their respective existences in the river, and while they were in det as to what respectively were their courses and managevees. The Toutonia,

. .

23.2

į. : 6

8. Because a cross-libel in an admiralty suit is dismissed the libeliant in the cross-libel is not precluded from showing in the original skit, that a collision was the result of inevitable accident, was occasioned by the negligence of these in charge of the other vessel, or was a case of mutual fault. Pitts, Estr, fe., v. River & Lake Shere Soumbont Line, 548.

9. Two ships under steam, if they are meeting end on, are required to put

their helms to port, and this requirement must be seemedly complied with.

Pergeost, fe., v. Reilroad Transportation Co., 549.

16. Selling rules are to prevent collisions, not to enable one party to see

11. The rule, that where both vessels are in fault the damages should be it. divided between them, ought not to be extended so far as to inflict positive oss on innocent parties. Constries Co. v. De las Cesas ; De las Casas v. Meaner Alabama et al., 350.

12. Usages, called sea laws, existed long before there was any legislation upon the subject. Steamship City of Washington, fre., v. Baillie, 580.

18. The owners of a pilot vessel are not liable for the consequences of a collision by reason of not having a mast-head light, when she constantly showed flash-lights, which were seasonably soon by the other vessel. M.

II. Liebilky of Ship Owners.

14. The owners of a vessel in flames towed by a tug and no longer in immand of her own captain and crew, are not liable for injury done by her another vessel, by the negligence of the captain of the tug; the said owners of hering employed the tug, she being a tug whose regular business was the mistance of vessels in distress, and she having gone, of her own metion, to be extinguishment of the fire in this case. The Christ and The Clara, 574.

15. The ewners of a vessel whe through their own carelessness set fire to

another vessel, cannot claim salvage for putting that fire out. Id.

16. Owners of ships are responsible for the conduct of the master and crew in the navigation of the vessel. Rebert v. Propeller Galates, 678.

\$1. Enciptions exist where it is necessary to employ a streaming and to

ADMIRALTY.

turn over the control and navigation of the ship to the master a the latter vessei. Kobert v. Propeller Galetca, 676.

III. Maritima Lica.

18. The captain of a vessel has no authority to ploige the craft of the owner for necessary repairs made at the home port. Prats v. Clarke, 68.

19. The fact that the captain is a co-owner gives him no such authority. To bind the owner, the master must have special authority for that purpose; or the owner must have held out the master as having such authority; or he must have ratified the contract after it was made. A

20. A maritime lies for supplies farnished a vessel exists in the port of a

state where her owner does not recide. Durell v. Goods, 188.

21. The United States courts have exclusive jurisdiction to enforce such

ion by suit in rem. . Id.

22. The residence of the owner determines the home port of the vessel. IJ.

AGENT. See Corporation, 29.

1. Persons dealing with an agent, acting within the scape of his authority. are entitled to the same protection as if dealing with the principal. Angle v.

Life Inc. Co., 780.

2. If money horrowed by an agent on the credit of the principal without authority, goes into the principal's business without the latter's knowled and the principal has the benefit thereof, yet the principal is not liable therefor to the person of whom it was berrowed, in the absence of a premise to pay. Spread v. Thompson, 678.

3. An agent cannot act for both buyer end seller. Find v. Lever, 348; and

see Brokus, 2, &

4. A tenant of a corporation, under a lease made by its agent, cannot contains

pute the agent's authority. Brain v. Jersey City Forge Co., 116.
5. An agent who demands possession for his primipal, must be

to make the demand at the time of making it.

6. An action may be maintained by an undisclosed principal upon the cod-

tract of his agent. Bryant v. Walls, 408.

7. Notice to an agent to be notice to the principal must come in the course of the principal's business, or from a prior transaction then present to the agent's mind, which could be properly communicated to the principal. Hoover v. Wise, 546.

8. But notice or knowledge on the port of an agent of on interme

employer will not affect the principal. M.

9. To make the not of an agent done without the authority of his principal binding upon the latter, it is necessary to show that he su full knowledge of all the material facts, ratified the act. Busess v. Worldd.

10. Where an agent lends the mency of his principal upon a scentty which proves to be insufficient, evidence may be introduced to show that the value of the security was very much less than the estimate placed thereon by value of the security was very much less the

the agent. M.

11. It is not competent to prove the supposed authority of an agent what he has said at some previous time. Howe Machine Co. v. Clark, but 12. The admissions of an agent can only be received after it has be proved that he is an agent. First Uniteriou Society v. Fauthor, 508.

13. The declarations of an agent in pair are not proof of his au ageat. Grin v. Bonnell, 274.

ALIMONY. See Convesor or Laws, 4.

ALLUVION.

1. Moone an addition to riperion land, gradually made by the water to which the land is contiguous. County of St. Clair v. Levingston, 275.

h the wit one may see that progress ! 2. The test is that, thoug A MAN BO

ade, they could not perceive it while the pre 8. It is equally alluviou whether the addition ion be to a AMENDMENT. See CHECK, 7; TRESPASS, S.

In a bill to enforce an implied trust, an averment of an express p perform the trust does not constitute a new cause of action. Hall v. Consdon, 617.

APPLICATION OF PAYMENTS.

1. Payments made to a creditor holding demands both dup and undus without direction by the debtor as to their application, must, ordinarily, be Arst applied by the ereditor upon the demands due. Early v. Manary, 38.

2. Payments must be applied to notes not barred by the Statute of Limit-

ations. Moore v. Kiff et al., 382.

AQUEDUCT. See BASEMENT, 3.

ARBITRATION. See Limitations, Statute of, 4.

1. Parties in the Court of Admiralty, whether sitting in prize or a instance court, can submit their case by rule of court to arbitration. United

States v. Farragut, 247.

2. The award however is liable, like any other award, to be set soids in the court below, for such reasons as would be sufficient in other courts; at for exceeding the power conferred by the submission, for manifest mistake of law, for fraul, and for all other reasons on which awards are set aside in other courts of law or chancery. Id.

3. By a parol agreement to submit to the arbitration of two persons, it was etipulated that, in case they could not agree, they should select an ampire, and that the decision of such ampire and any of said arbitrators should be final. The decision of the umpire was all that was required. Sanford et al.

T. Wood, 52.

ARMY. See War, 2, 2,

ASSAULT AND BATTERY. See Crimital Law. IIL

ASSIGNMENT. See DESTOR AND CREDITOR. I.

ABBUMPSIT. See Action 5; Contract, 1; Limitations, 4.

ATTORKEY. See Hushand and Wurs, 21.

1. The major or councilman of a municipality is not bound by his efficial position to give to the latter his professional services as a lawyer without arge. Mayor V. Mussg, 189.

2. An attorney has no claim to be reimbursed or allowed for costs and ex-

penses growing out of his wrongful act. Hughes v. Zeig'er, 809.

3. There may be different degrees of guilt as between the parties to a fraudulent or illegal transaction. Roman v. Mali, 487.

4. The relationship of attorney and client will not except the case from the eparal rule, in pari delecto petier est conditio possidentis, aut defendantis. M.

5. An attorney is under no actual incapacity to deal with his elient. If

be transaction is fair it will be maintained. Id.

8. A complainant, who files a likel to procure the forfulture of personal property for violation of law, and procedutes the same wholly at his own expense, is entitled to do so without interference from the state esturney. Date v. Tufte, 495.

7. When such libel is presecuted at the expense of the county, its direction of the county, its direction of the county of the

tion will be taken charge of by the attorney-general or solicitor. At.

8. A presenting officer will use his discretion, according to the circumstance. stances of each particular case, whether to enter a noise present, or presents to final judgment. Id.

9. Attorneys should be residents of the state in which they are licensed to practice. They are officers of the court and the nature of their office imthat they shall be residents and subject to the jurisdiction of the state and the court. In re Messes, 670.

10. An atterney of record signed an agreement in writing that the report of the referes should be final, and the agreement was entitled as of the term of the court to which the report was to be made. Hold, that his client was bound by such agreement. Breeks v. New Durham, 116,

BAIL

Power or Courts to Admit to, 1.

BAILMENT. See Common Carbier.

1. A halfee cannot at law deny that his bailor had title to the property of the time of its delivery to him. Nudd v. Montenge, 188.

2. A piedge is a security for the whole debt and every part of it. Buildein

v. Bradley, 200.

8. A bailee keeping the property of the bailer with the ordinary care with which he keeps his own, does not fulfil his duty, if the contract required strict diligence and extraordinary care. First National Bank v. Graham, 218.

4. Where the benefits are reciprocal, the bailes is liable for neglect of ordipary care, although he has been careless and reckless in the management of

his own goods as well as these of the ballor. M.

b. That the beiles has dealt with his own goods and the baller's in the same way, is evidence in adjusting the standard of duty and deciding the question of performance, and as a test of the bailee's good faith. It would raise a presumption of adequate diligence. Al.

6. The believ's responsibility is to be determined in such case by a com-

parison with the conduct of classes of men, not of individuals. Al.

7. The mere voluntary act of the enshier in receiving securities for safe keeping, will not render the bank liable for their loss; but if the depend be known to the directors and acquiseced in, the bank will be liable. Al.

BANK AND BANKER. See Batterns, 7; Cubok, 4-6; Contract, 1, 2; G171, 3; Sut-off, 4, 5.

A previous demand by a depositor, or some other person by his order, to indispensable to the maintenance of an action for a general deposit of money with a banker. Hrahm v. Adkine, 496.

BANKRUPTCY.

L. Effort of l'recordings. See LANDLORD AND TENANY, &.
1. Where, pending a suit in a state court for the forcelesure of a mortgage, the mortgager is adjudicated a bankrupt, there is no provision in the Bankrupt Act which would provent the court from proceeding with the case. Epster

v. Goff et al., \$49.
2. The debter of a bankrupt lesse none of his rights by the bankruptsy of

his adversary. M.

3. Plea in her that since the commencement of suit, the defendance had been adjudged bankrupts, Hold, bad on general demarrer. Brandon Co. v.

4. It was the object of the fourteenth section of the Bankrupt Act to proyear any particular creditor asserting any lien but such as existed when the

petition in bankruptey was fied. Morgen v. Comptell, 252.

B. Under a statute which exacts that the "owner" may within a time named redeem land said for taxes, a redemption may properly be made by a person who has been decreed a bankrupt, the lands having been his. Humpton v. Boues, 248.

6. A mortgage cannot be discharged by a sale of a bankrupt's land by order of court without notice to the mortgages. Ray v. Noreaverthy, 406.
7. As to supervisory jurisdiction of Circuit Court, see Bishney v. Will,

400.

II. Proferences.

S. An agreement by a judgment-debter to revive a judgment so as to create a lien on after-nequired land, within four months of adjudication of bank-rupter, is not in frond of the Bankrupt Law. Kannerer v. Tool, 878.

7. The circumstance that a debter concepts to do what was for his own advantage would not affect the creditor with knowledge of insulvency, which

from other facts he had no reasonable cause to believe. M.

10. The bankrupt's real estate was sold by the shorts, who pull the judgment-oraditor in the revived judgment. Bull, that the state evert had jurisdiction to entertain a suit by the assignment in bankruptey for the recovery of

BANKBUPTCY.

the mency so paid, if the judgment has been in fraud of the Bankrupt Law. Kemmerer v. Tool, 275.

11. Construction of sections 14, 85 and 39 of the Bankrupt Act of 1867.

dman and Uthers v. Smith, Assignes, 875.

12. A new mortgage for principal and interest of a previous one everdue is not a preference, although made within four menths of bankrapter. Burn-

tied v. Firman, 117.

13. A judgment obtained against a debter within four months before proceedings in bankruptcy were commenced is not per se in fraud of the Bankrupt Law, although the creditor had reason to believe that the debter was insolvent at the time. Louchein v. Henery, 116.

... 14. Actual collusion, or fraud in fact, is always for the jury. M.

15. The United States is a preferred creditor as to the separate and individual access of bankrupt partners. Lowis v. United Status, 678.

III. Discharge. See Ynnbou And Puncuasur, 12.

16. A discharge in bankruptcy cannot be impeached collaterally. Suith v. Remory, 720.

IV. Assigner. See PARTHERAUTT, 1.

17. An assignment of a bankrupt's land by a register to an assignbe in bankruptcy, not acknowledged or proved as required by the laws of l'enneyi-

vania, cannot be recorded in that state. Zeigler v. Shone, 488.

18. From the commencement of proceedings in bankruptcy the estate of the bankrupt is in the custody of the District Court of the United States. M.

19. A purchaser at an assignee's sale is not bound to see that every particular in the assignee's appointment has been complied with; he takes whatever title was in the bankrupt. Id.

20. It is no defence to an action of ejectment brought against a bankrupt for land sold as his, that the right of possession was in his wife when the

writ was served, if the wife had no title. Id.

MILL OF EXCEPTIONS. See ERRORS AND APPRAIS, &

MEL OF LADING. See Bills and Notes, 21.

... Where sent with draft with Instruction to deliver the goods only on payment, and the consigues in violation of orders, delivers to a third party as rehaver, the latter acquires no title and is liable to the consigner in trover. Dure v. Nat. Ex. Bank, 681.

MILLS AND NOTES.

L. Form, consideration, Je.

1. Where a statute directs that any note " given for a patent right," shall contain those words in the body thereof, and makes it a misdemensor for any person to take a note for such consideration without the insertion of thos words, the note itself is not illegal and void without these words, not is is within the rule that the infliction of a penalty upon an act makes it per as illegal and prevents it from being the foundation of a civil action. Hence, when the maker of a note for such consideration omits to heve the words inserted, the failure of enasideration is no defence against an innovent for for value. Pendar v. Kelleg, 511.

2. A note premising to pay B. or bearer forty dollars "profits," with ' laisrest, etc., is negotiable. Matthew v. Crosby, 497.

3. A warrant of attorney to confess judgment destroys negotiability.

Breancy v. Thicketon, 52.

4. Where a note appears to have been altered after execution, the jury
the elements is such as ought to put a bout fide pur-

must judge whether the alteration is such as ought to put a boad fide purchaser upon inquiry, or whether it was left by the maker in such a condition as to give an opportunity for fraud. Iron Mountain Bank v. Armstrang, 732.

3. Where a party to a negotiable instrument intrusts it to another for use as such, with blanks not filled up, such instrument entries on its face so implied authority to fill up the blanks; but this authority would not authorise the necessial teams by transfer he person latrasted with the instrument to eiter its material terms by traci ly written or printed part of it. Angle v. Life Inc. Co., 180.

BILLS AND NOTES.

8. Where a note was given for an amount due the payee from the maker on a certain contract, this was a reflicient consideration, although the payee may have owed the maker at the time more than the face of the note, on other contracts. Know v. Clifford, 184.

" IL. Rights of the Parties. See BILL OF LABORS.

7. Where a plaintiff suce on a note as trustee for easther, the maker may avail himself of any defence which he might set up against the real ewner-

Belehradsky v. Kuhn, 248.

8. An Indiana bank drew on a Philadelphia bank in favor of the cashler of a New York bank; the draft was stolen, the same of the eachier (payee) forged as endorser and passed to defendants, October 16th, in payment of goods sold to the holder, they giving to him a check on the Philadelphia for the difference, which was drawn, and the draft, endorsed by the def ants, was deposited to their credit in the some bank. After learning of fraud, on November 3d, the bank demanded payment of the draft from fendents. Iteld, that the demand was in time. Chambers at al. v. Union No. tional Bank, 375.

9. The holder of a draft which is endorsed and passed by him, guaranties

the prior endorsements. Id.

10. In an action on a promissory note, evidence is inadmissible to show a parol agreement, made when the note was given, that is should not be nego-

tiated by the payee. Anar v. Clifford, 184.

11. One who purchases negotiable paper, before maturity, without notice, in absolute payment of a pre-existing debt, surrendering his previous suchrity, in protected by the law merchant against all equities of the maker as against the payoe. M.

12. One who makes and puts in circulation a negetiable note, bearing date on a secular day, is estopped, as against an innocent holder, from showing that it was executed on Bunday. Id.

13. After accepting and paying a bill, the drawee cannot recover back the amount of it from the payer on the ground that he had paid it under a mis-take as to the reliability of the drawer's security, which had proved to be Scitions. National Bank v. Burkham, 184.

14. Where the makers of a promissory note are sued jointly, the defence of illegal interest by one of the defendants inures to the bonest of all. Mi-

ler v. Longuere, 679.

!:

15. One who takes a procliable note before meterity, at its full value, in payment of a pre-existing debt, in good faith, and without notice of envising that would invalidate it in the hands of the payer, is a beat fide belier for value. Russell v. Splater, 53.

16. Where the payon takes up a promiseory note after its negetlation by

him, the ownership, both logal and equitable, will return to him, and he may maintain an action thereon in his own name. Palmer v. Gardiner, 407.

III. Endorsement, Acceptance, fo.
17. Adams, a partner of Moorehead & Co., drow a note in favor of Whitten & Co., of whom also he was a member, and, after it was endorsed by the payees, endorsed the name of Moorehead & Co.; the note was sold to the laintiff by a known bill-broker. Hold, that these circumstances were not notice to the plaintiff that the endersement was without authority. Me head v. Gilmere, 52.

18. Each partner has the same right to raise money for the use of the firm by endorsement of negatiable paper as to do so by means of paper already lesued, and the public is not allested by the private restriction on the power

of each partner. M.

19. Where the holder of a time-draft, with accompanying bills of tading, sends them to an agent with no special instructions to hold the bills of lading, the agent is authorized to surrender the bills to the drawes on the latter's acceptance of the drafts. National Bank of Commerce v. Marchante National Sunk, 169.

20. It does not make any difference that the drafts are sent to the agent

BILLS AND NOTES.

"for collection." That instruction merely rebuts the inference of the agent's ownership of the draft. National Bank of Commerce v. Merchants' National Bank, 102.

21. Bills of lading, though transferable by endorsoment, are only quad negotiable; and the endorses dots not acquire the right to change the agreement between the shipper and his vendes. M.

22. A bill of exchange may be accepted by perel. Boulder v. Union Na-

tional Bank, 819.

22. A partnership firm becoming owners of a note made by one of the firm cannot recover at law upon it, but may in equity. Hall v. Kimball, 406,

BOUNDARY.

Where, in a deed, the middle of a stream is colled for so the boundary line between adjacent proprietors, it will control the courses and distances named in the coursesand distances. Nichans v. Shapherd, 202.

MOKER

1. Korns his commission when he finds a purchaser at the proper terms, though the sale fails to be made an account of the owner's action. Lens v. Altright, 58.

2. When a real estate broker, employed to sell a farm, disposes of it by way of exchange for other real estate, he is not entitled to charge the owner of the latter a commission. The law does not permit the broker in such a case to act as agent for both parties. Even an agreement to pay such commission sould not be enforced by an action thereon. Buildin 7. Clarke, 61.

3. Nor could an action be maintained by proof of a custom or usage. M.

And see AGENT, 8; CONTRACT, 22.

4. Plaintiffs were bankers and paid their tax as such. They also bought and sold gold and stocks for others, and on their own account. An additional tax upon them, as brokers, for all their sales of this kind, as well those on their own account as those for others was proper. Warren v. Shook, 349.

CAPTURED AND ABANDONED PROPERTY. See LANDSORD AND TEN-ANY, 1.

A factor is not an ewner of property within the meaning of the Ahandened and Captured Property Act, at least not beyond the extent of his lien. United Buter v. Villalongs, 276.

CHARITY. See TRUST, 4.

CHARTER-PARTY. See Surprise, 1.

CHATTEL MORTGAGE. See Repleviu, 1.

CHECK.

1. The helder of a bank check is bound to present it within a reasonable time; otherwise the delay is at his own peril. If sedruff v. Plant, 148.

2. But what is a reasonable time must depend upon the particular elecumplaness of the case. And the time may be extended by the assent of the

drawer, express or implied. Id.

- 2. The plaintiff, desiring to make a remittance to a creditor at a distance, and there being no bank in the place where he lived, asked the defendant, who had an account with a banker in a neighboring city, to take the amount of him in bank bills and give him his check therefor, and the defendant, fully understanding the object, took the bank bills and gave the plaintiff his check upon the banker, payable to the plaintiff's order, the defendant the same day depositing the bills with the heaker. The plaintiff at once endersed the check to his creditor and sent it by the next mail. It was three days before the check reached the place where the banker recided and was presented for payment, at which time the banker had failed and payment was refused. The plaintiff having taken up the about such the defendant thereon. Hidd, that the check was presented within a secondable time in the circumstances, and that the defendant was Habie.
 - 4. It is the duty of a bank to whom a check is sent for collection to pre-

CHECK.

sent it and demand payment within the time prescribed by law, and if not aid notify the proper parties of its dishonor. Eners County Not. Bunk v. Bank of Montreal, 418.

5. A bank upon whom a check is drawn is liable, before acceptance, only to the drawer; it cannot be made liable to the holder except by its own con-

sent. _ M.

- 6. If a bank to whom a check is sent for collection, instead of demanding immediate payment, accepts a certification of it, that will create such a new relation between the parties as to discharge the drawer, and will render the hank accepting the certification in lieu of payment, liable for any less arising to the holder from the failure of the hank upon which the ebeck was drawn.
- 7. The party to whom the check is endocsed for collection is the proper plaintiff, and an amendment, under the practice in Illinois. is allowable at the trial, substituting such party as plaintiff. Id.

CHURCH. See Public Schoole; Taxation, 4.

1. It appeared that the land on which the Catholic church and parsonage in Portsmouth stands, was vested in the defendant, Bacon, bishop of the discese, no trust holog declared in writing: Ileid, that no special trust could be proved by parol. Ilennesses et al. v. Walsh et al., 264.

2. It appearing that the funds with which said land was bought had been furnished for that purpose by subscriptions and contributions made to the priest in charge for the time being, under the law, usage and polity of the Roman Catholic church, by Catholics and others resident in Portsmouth and elsowhere: Ill-ld, that no trust resulted to the society or congregation worshipping in said church. M.

3. The defendants having stated in their acover that by the law, mage and polity of the Roman Catholic church, the title to all lands used for religion purposes, churches, &c., is vested in the bishap of the discuse in which the same are situated, for the use and benefit of the universal Catholic church, and that these contributions were made under that rule, and it having been found by the court that the legal title to the property was vested in the defendant, the bishop, without any written declaration of trust, and that he was accountable only to his occlesiastical superiors: Ifold, that the said defendant was not accountable to the congregation for his management of the property; het a court had no authority to take this property from the bi place it in the hands of a new trustee. M.

4. The interference of civil courts in ecclesiastical controversies discussed.

Note to Id., 276,

5. A legislative act of a syned which forbits the franchises and property of a congregation, is in the nature of a judicial contence and ineperative t MeAulty and others' Appeal, 118. it is uitra vires.

· COLLATERAL SECURITY. See Dubton and Crubiton, 4, 7; Equity, 18. COLLISION. See Admirately, L.

COMMON CARRIER. See RAILBOAD.

1. A bailes of goods, sending them by a carrier, may sue the carrier for the delivery of the same to the consignes without payment, where payment was imposed as a condition of delivery. Murray v. Warner, 119.

2. Is liable, netwithstanding a stipulation against liability in the bill of lading, if injury was caused by his negligence. Welch v. Italiand Ca., 140.

3. A stipulation by a bailer for hire for exemption from the consequences of his own negligence, has no validity, but there may be a valid stipulation for a degree of responsibility less than that imposed by law.

4. Where a stipulation in such a case was open to a question as to whether it intended an exemption from all liability or only a limitation of the community liability, and the judge charged the jury that it was void, but that the defendants would be liable only for went of ordinary care, it was held that the defendants were not injured by the charge of the judge; that the stipula-

CONSTITUTIONAL LAW.

H. Powers of the Rate Legislatures. Ree auto, 3, 6; TAXATION, 2.

3. A statute of Louisiana prescribed that a commission should be prima facie proof of right to judicial office, and if any incumbent refused to vacate e should be cited by rule returnable within twenty-four hours to present h claim for adjudication before a court, which should hear the case without a ary, and its determination should be final unless appealed from within one This was "due process of law." Kennard v. Nate of Louisiana, 381.

9. A change of estates in fee-tail to estates in fee-simple by statute is not an interference with vested rights, nor beyond legitimate legislative power.

Pollack v. Spoidel, 851.

10. The provision of the Constitution of Missouri, which ordains, " The General Assembly shall have no power, for any purpose whatever, to release the lien held by the state upon any railroad," was not meant, in case of a failure by the railroad companies, to prevent the state from making a com-premise with any railroad company of any debt due to it or to become due; nd on the compromise being effected to release the lien. Il section v. Murduck, 248.

11. A state has the power to subject the property of non-residents, within its territorial limits, to the satisfaction of the claims of her citizens by any iede of procedure which it may deem proper and convenient, and theref may, for such purpose, authorize a judgment to be given against such non-resident prior to seizure of such property and with or without notice of the

proceeding. Neff v. Penneyer, 867.

12. But where a title depending on such or parte action comes before neart of another jurisdiction, the proceedings will be closely examined to see that all the statutory requirements for their validity have been complied with.

13. The common-law presumption in favor of the jurisdiction and regular-My of the proceedings of courts of record of general juriediction, had its origin in the fact that at common law no judgment could be given against a defendant until he had appeared in the action; but no such presumption does or ought to apply in cases where the defendant is a non-resident, and there was

no appearance, and only constructive service of the summons by publication.

14. A local option law submitting to the people the allowing of licenses to sell liquor is not a delegation of legislative power. Fell v. The Bate, 310.

15. A license to sell liquor is in no sense a contract made by the state with the party holding the license. It is a more permit, subject to be medified or annuled at the pleasure of the legislature. Id.

16. Where a law is signed by the speakers of both houses, and approved by the governor, there is a presumption, only to be overcome by clear proof, that it has been legally and constitutionally passed. Larrison v. Peeria, Atlente & Decatur Hailroad Co., 428.

17. A liceuse tax required for the sale of goods is in effect a tax upon the goods themselves. Welton v. State of Missouri, 165.

18. A statute of Missouri which requires the payment of a liceuse tax from persons who deal in the sale of goods, which are not the produce of the state, by going from place to place to sell the same in the state, and requires no such liceuse tax from persons selling in a similar way goods which are the produce of the state, is unconstitutional. produce of the state, is unconstitutional. Id.

19. The inaction of Congress in prescribing rules to govern inter-state promotes is equivalent to its declaration that such commerce shall be free

from any restrictions. Id.

20. A tax demanded of the master or owner of a vessel for each passenger is a regulation of commerce by the state, in conflict with the Constitution and laws of the United States, and therefore void. Ifenderson v. Wichen, 746.

21. As to statute of California taxing immigration. Cly Lung v. Freeman,

22. If the right of the states to pass metutes to protect themselves in regard to the criminal, the pauper and the discused foreigner landing within their orders, exists at all, it is limited to such laws as are absolutely necessary

22. The legislature may, in matters purely local and municipal, exact

CONSTITUTIONAL LAW.

conditional laws, and permit the people or proper municipal authorities to decide whether such laws shall have force in their respective municipalities. Blinger V. Hunaman, 183.

III. Taking Private Property—Eminent Dunain. See Course, 6.

24. After damages have been assessed, on a condemnation of land for a railroad, the trees which may be useful in the construction of the read, standng on the tract taken, become the property of the company. Togler v. New York & Long Branch Railroad Co., 122.

28. Where a legal and illegal assessment for benefits are so blended that they cannot be reparated, the whole arresoment will be set aside; but application may be made for a re-encomment. Since v. Plainfield, 122.

36. Where the charter provides for constructive notice of improvements by whitestion, personal notice is not required. Sinte, Beier press, v. Plainfield,

27. It is the right of a landowner especially affected by a public improveeat, to be informed either by actual or countractive notice of the time em place appointed for the meeting of rouncel to consider their proposed action. M.

26. Right and Power of Emineur Domain in the National Got-

ERNMENT, 193.

29. The laying of taxes is a legiclative function, and the policy and expediency of it, as well as its amount, are questions exclusively for that depart-

ment of the state. Perry et al. v. City of Airone, 397.

30. There is no abstract legal principle by which to determine whether a use is public; a court must decide it as a conclusion of fact and public policy, in the same manner as the legislature. Hence, while it is clearly the di of a court to determine finally what is a public purpose, it will easly decide adversely to the judgment of the legislature in a clear case. M.

31. If a purpose is public, it makes no difference that the ages it is to be carried out is a private individual or corporation. M.

33. The building of a reliroad is a public purpose; and a statute authorising a town to vote money to aid in such purpose, even though the money is to be given as a greeteity and not as a subscription to stack, it not unconst tional as a taking of private property for a private use. M.

23. The right of emissest domain is inherent in all governments. . For all arposes required by the constitution, this right exists in the United State independently of any consent of the state in which the property live. Kolf

V. United Sentra 514.

34. Such state can neither central the right nor prescribe the mode of its exercise. Its consent is necessary, if at all, only for the transfer of exclu-

sive jurisdiction and right of legislation after the land has been acquired. M. 38. Semile, a state has no power to condomn and take lands for the use l the United States. The correct made is a proceeding by the United States

s. The word purchase is technically large enough to include an arquisition by taking under the right of eminent domain, but as used in statutes generally it means only an acquisition by contract between the parties without government interference. In connection, however, with the words "at private rate or by condemnation," it includes the authority to take land by virtue of eminent demain. M.

87. A proceeding to take lands for public was, is a suit at common law within the language of the Judiciary Act of 1790, and where Congress has not prescribed any other tribunal, the Circuit Court has jurisdiction. M.

IV. Military Courts.

20. The Constitution did not prohible the creation by military authority of courts for the trial of civil course during the civil war in conquered partient of the insurgent states. The establishment of such courts was the exercise of the erdinary rights of conquest. Mechanics' and Tradard Bunk v. Union Book, 186.

80. Whether such overt asted within its jurisdiction in a case where one has of the state of Louisiana was elektring from another hank of the same state it large sum of money, is a question emolasively for the state tribunals. ' M.

CONSTITUTIONAL LAW.

T. Passers of Judiciary. Ree onto 8, 80; Conforation, 9.

46. The right of the judiciary to declare a statute void for unconstitutionality is only to be exercised in clear cases, and this rule applies with especial force to decisions upon motions for provisional injunctions. Lethrop v. Stedmas, 346.

VI. The of Ad.

41. It is sufficient if the title of an act fairly give notice of its subject so as reasonably to lead to an inquiry into the body of the bill. State Line Railroad Co.'s Appeal, 119.

CONTEMPT.

Punishments for contempt of court have two aspects, namely: 1. To vindieate the dignity of the court; 2. To compel the performance of some order or decree. In re Chiles, 120.

CONTRACT. See Compaderate States, 4; Corporation, 9, 10; Husband AND WIPE, 7.

1. Government bonds were deposited in a bank; the depositor alleged that the bank bought them from him at par, fraudulently informing him that there was no premium on them, when there was, within the knowledge of the bank. The depositor such the bank for the premium and declared in the common emey counts: Held, that the depositor could not recover on those counts. entry's Executors v. Bank, 209.

2. If the bends were purchased by the bank in good faith at par, although they were then solling in the market at a premium, of which both parties were ignorant, the depositor could not, on the ground of mutual mistake, re-

cover the bends or the premium on them. Id.

8. The agent of a foreign liquor-selling cotablishment obtains an order which he sends to his employers for approval. Hold, that there is no completed contract until the order is approved and accepted, and that if that is done outside of the state, it is a foreign contract, and not void as in violation of the liquor law of Michigan. Kling v. Fries, 881.

4. Illegality and had faith are not to be presumed against a foreign con-

tract, but must be shown. M.

5. Agreements in restraint of trade to be yeld must be limited in time or partial in their operation and supported by Moient consideration. Heriston's Appeal, 876.

6. That a court of equity may enjoin the free exercise of a trade, the violation of the agreement should not be in antiful. Id.

7. When damages will compose the beautiful derived or the loss suffered, equity will not interfere by injunction. Id.

2. A contract baving for its confidention of agreement to suppress a criminal processulous is void. Kind-out v. Long. 309.

8. It is equally so, if any part of the continuous. protion of agreement to suppress a crim-

9. It is equally so, if any part of the constitution was the suppression of the presecution, and whether the contract was induced by promises or threats on one side or the other.

one side or the other. The promise the promise the same time the same time.

as the contract; is is sufficient if it was make prior thereto, and was acted upon as a part of the ionsideration or industment. Id.

13. Her does it make any difference that a procession is already commenced and is in the hands and under the control of the Commonwealth's officer, if the private processor, as consideration for the control, promises to abandon his own efforts in the course of justice. The particular inserest of the party injured, in bringing the effector to justice, if one of the courties of the public justice, in a particular inserest in ared, in bringing () the enforcement Areament by which this interest is s of the laws, an 4 407 4 b is 701

sted in the fines the parties employ them, though sing. But such special meaning west to plain. rime are to be fut uy to the acceptes many to

Coy v. Transport

mel est 10 to luck. See Buber v. White, 269. 12 As to on thered by one purty and recepted by the other is bind CONTRACT.

15. A written contract for the sale and delivery of a certain quentity of wood at a stipulated price per cord, not, in terms, fixing the time of payment, is payable on domand after delivery. Brandon Manufacturing Co. v. Mores,

16. Where the secretary of the navy pessesses the power to enter into contracts for the construction of vessels of war, and a suspension of the work is ordered, he is authorized to settle with the contractor upon the compensation to be paid for the partial performance of the contracts, and such a settlement made in good faith is equally binding upon the government as upon the contractor. United States v. Corline Steam Engine Co., 619.

17. Defendant bought 4000 barrels of oil from plaintiff, and eight similar

papers of same date were executed by them, such for the delivery of 500 errels on the last day of consecutive months, payment to he made on such delivery. Ileid, not to be an entire contract. Morgan v. McKat, 84.

18. The plaintiff, on demand, refused to deliver the oil due on one of the appointed days; the defendant, on the next day for delivery, gave notice of rescission, on the ground of the previous default. Itald, the plaintiff might o plaintiff might recover for refusal of defendant to accept and pay for the ell which was tendered on the days appointed for the subsequent deliveries. Id.

19. The right to rescind a contract must be exercised within a reasonable

line after the breach. What is a reasonable time, is for the court. M. 30. Evidence was luadmissible, that at the time of the purchase it was agreed that it was an entire contract, and that the several p apers were executed with that understanding and according to the custom of the trade. M.

21. A simple contract given for the same dobt will merge in a specialty, except where one is intended to be simply colleteral to the other. Lemand

22. The policy of the law ferbids that a person acting as the friend end confidential advisor of a purchaser, should at the same time be secretly reesiving compensation from the celler for effecting the sale; and a contract for such compensation is void. Bellman v. Leonis, 75; and see Brown, 2, 2,

CORPORATION. See Common Carrier, 6; Contract, 18; Courts, 8; Judgment, 4; Master and Servant, 7, 8; National Bane, 2; Trust, 2.

1. The treasurer of a corporation is the proper officer charged by law with the custody of its funds, and responsible for their safe-keeping. The directors cannot lawfully deprive the corporation of the heacht of this responsibility by depositing the funds with others for safe-keeping, and may be

restrained by injunction from so doing. Pearson v. Tour., 120.

2. Employees of a defaulting railroad company are not to be considered as creditors at large of the company in regard to their claims for wages in arrears at the time of the appointment of a receiver for the company. Denous

v. Chemprake & Ohio Railroad Co., 428.

8. When mortgagees come into a court of equity seeking estisfaction of their claims against a railroad company by suit for foreclosure, they should be required to actisfy all arrearages of pay due employees out of the trust preporty or its future earnings. M.

4. A foreign corporation can do business in Ohio. Newbury Petroleum Co.

v. Weare, 741.

5. A subscription to the capital stock of a railroad company on the condition that its ratiread shall pass through a certain place, bethe location of the road through the place named. Manufield, free A Co. v. Stout, 680.

4. County authorities cannot hold out any offer to a railroad company to a

scribe to its stock, prior to any vote of the people, upon which the comple has a right to rely. The People v. Car Co., 446.

7. The principle that a stockholder of a company consist maintain a bit equity against a wrongdoor to prevent an injury to the corporation, unlik shall be averred, and shall affirmatively appear, that the experience is refused to take measures to protect levels, does not extend to a bill which in good faith field by a creditor. Lathrey v. Deduce, 306.

CORPORATION.

8. A holder of a policy in an insurance company is a creditor within this is. Lettrep v. Stedmen, 346.

9. A charter is a contract between the state and the corporators, and the orporation takes the grant subject to the limitations contained in the act of poration. If no power of repeal is reserved, none can be exercised p but when a charter itself or a general statute provides that the charter is subjest to repeal by the legislature, at its pleasure, without restrictions or conditions limiting the power of repeal, the legislature has the right to exercise its power summarily and at will, and its action, being a legislative and not a judicial act, cannot be reviewed by the courts, unless it should exercise its power on wantonly and earelessly as to palpably violate the principles of notural justice. M.

10. A repeal of a charter does not of itself violate or impair the obligations of any contract which the corporation has entered into. But the legisero cannot establish such rules in regard to the management and disposition of the assets of the corporation, that the avails shall be diverted from or di-vided unfairly and unequally among the creditors, and thus impair the oblion of contracts, or that the portion of the avails which belongs to the schoolders shall be sequestored and diverted from the owners, and thus la-

jare vested rights. M.

11. The legislature has the right to appoint a trustee, to take the assets and manage the affairs of a corporation, whose charter has been repealed, in conformity with the general, just rules which it has prescribed, or with the rules of a court of equity, if no statutory provisions have been enacted. If no trustee is appointed by the legislature, a court of equity, which never allows a trust to fall for the want of a trustee, would see to the execution of that trust, although by the dissolution of the corporation the legal title to the property had been changed. M.

13. A shareholder may personally maintain a hill against directors of a corporation who have fraudulently mismanaged its affairs. Wett's Appeal,

440,

18. When an act of directors is in excess of their authority, but done with a bond fide insent of benefiting the corporation, and a shareholder, knowing of it, does not dissent within a reasonable time, his assent will be presumed, and he cannot galussy it; and when the act of the directors complained of is to be followed by a large expenditure, the shareholder should not only make his protest within a reasonable time, but should follow it up by active proventive measures. M.

14. Six years' emission to proceed would be a bar to an action against

directors for the misuse of the corporate property. M.

13. The stockholders directed public sales of their lands, and that payment might be made in each and in their bonds: Medic, the payment in bonds was equivalent to each. M.

16. Directors bought at the sales at fair prices, and the sales were con-

d openly and fairly: Ifold, the sales to them were valid. M.

17. Directors of a railway company cannot gratultonally give away certificates of stock to contractors building the road, for the purpose of giving them a controlling influence in the election of its officers. Railroad Co. v. Adley, 441.

18. Merger depends largely on intention, and this rule applies to a case where a corporation purchases shares of its own stock. The purchase suspends the right to vote on the theres, and may be a merger if so intended; but if not so intended, it is not a merger, and the presumption in that the corporation does not intend a merger, but to hold the stock as assets, or to call and reissue it. State or ref. Page v. Snith, 464.

18. A querum of the directors of a corporation are competent to act within the scope of their powers and to bind the corporation, although the meeting was not regularly called and there was no notice to the other directors. M.

10. A sale of the company's chares of its own stock, made at such a most by of the directors, if made book fide and for fall value, and for the purpose of paining money to most an urgest mosterity of the tempony passed & go

CORPORATION.

prima facie title to the shares. Any director or stockholder desiring to avoid ach sale, must proceed at once to dispute it in legal form. State as rel. Page v. Smil, 466.

21. If the sale is otherwise valid, it is not vitlated by the fact that the motive of the parchaser and of some of the directors was to enable the former to vote upon the shares in a certain manner at an approaching election of

corporate officers. Id.

32. Where new stock is isrued which is to share in profits with existing stock, all the holders of the latter have an equal right to subscribe for their proportionate part of the new stock, but this rule does not apply to original stock bought in by the corporation and held as assets, and sold for the pay-

ment of liabilities or for the general benefit. M.

28. Where a director lends money to his corporation, taking a deed of trust to secure the same, he must act fairly and be free from all fraud and oppres-

sion. Ilarta v. Brown, 553.

24. A director can loan money to a corporation when the money is needed, and the transaction is open and otherwise free from blame. Oil Company v. Marbary, \$80.

25. An insolvent corporation cannot purchase in a portion of its capital

stock. Currier v. Lolandon Mate Co., 600.

26. Where shares of stock in a banking corporation have been hypotheexted, and placed in the hands of the transferce, he will be subjected to all the liabilities of ordinary owners. Wheeleck v. Keet, 388.

27. A stockholder of a banking corporation which is a corporation de facto, who receives dividends, will be estapped from invisting when saed by its ered-

iters that the corporation was not legal. Id., \$52.

26. Unpaid stock is as much a part of the assets of an insurance company the cash which has been paid in upon it. Surger v. Upton; Upton v.

29. A fraudulout representation by an agent that only 30 per cent. of the ar value was accessable, is no defeace to an action for the unpold factal-

ments. Id.

30. The transferee of stock on which the full nominal value has not be paid, is liable for asile on the unpaid portion made during his ownership,

without an express promise. Webster v. Upton, 636.

31. The capital stock of a business corporation is a trust fund for the protection of creditors, and neither stockholders nor directors can withhold or release any part of it from the claims of such creditors. The stock in this sense is the whole stock, not merely the percentage of it called in or paid. Al.

22. The subject of subscriptions to stock and the Nability of holders dis-

enseed. Id., note.

88. The plaintiff company was about being organized, and defendant having subscribed his name to a paper agreeing to take ten shares, was liable as a stackholder to assessments, although no shares designated by numbers be and grown to him. European & N. A. Railing Co. v. McLead, 808.

34. Contracts made by the promoters of a corporation before a charter is obtained are binding upon it, if the benefits under the contract have been as-

cepted and enjoyed by the corporation. Bell's Gap Railroad v. Christy, 630. In such case the premoters of the enterprise must be a majority of them. A minority could not bind the association or experentian. Id.

COUNTY. See Corporation, 6.

1. Counties are liable for the lackes or misconduct of their servants, when special statics are assumed or imposed on them. Honors v. &. Louis, 644, 2. Thus, where the county of the Louis made a contract for laying water-pipe to the county income saylum, the daty was not one imposed by general law upon all counties, but a relf-imposed one; and queed for the county was a private corporation, and governed by the same rules as to be liability. In each case it is immeterial whether the performance of the work is reluctorily assumed in the first instance, or is a special duty imposed by the legislature, and assumed to be the county. and accepted to by the county. A.

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COUNTY.

8. And municipal and quasi corporations are, under the above circumstances, subject to the same dectrine of liability. Illumen v. St. Leuis, 664.

COURTS. See CONSTITUTIONAL LAW, V.; REMOVAL OF CAUSES.

1. Where a majority of the court agree in the judgment that ought to be rendered, but disagree as to the reason for such judgment, such judgment must be entered. Railrond Co. v. Hubbard, 620.

2. The Supreme Court of the United States will not reverse the judgment of a territorial court on the construction of the territorial code. Sweeng v.

Lennr, 136.

8. Where an appeal can be taken from an inferior court of a state to the highest court of the same, only with leave of the latter, and that leave has been refused, a writ of error, if there be in the case a "Federal question," properly lies, under sect. 709 of the Revised Statutes, to the inferior court,

and not to the highest one. Gregory v. Mc Veigh, 498.

4. A Federal question exists when—in a suit by a person who seeks to recover property on the ground that a judgment and execution on it by a court of the United States, interpreting a statute of the United States, has deprived him of the property in violation of the first principles of law—the defendant sets up a title under that judgment and execution, and the decision is against the title so set up. Id.

5. The decision of the Supreme Court of a state that a company professing to be a corporation under the laws of the state is legally so, is conclu-

sive. Secombe v. Railroad Co., 498.

6. The mode of exercising the right of eminent domain in the absonce of any constitutional provision is within the discretion of the legislature. Id.

7. A judgment of condemnation rendered by a competent court, is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction. Id.

8. The Federal courts have no jurisdiction to enjoin proceedings in state

wourts. Isnines v. Carpenter, \$32.

9. The United States courts have power under the writ of habesz corpus to discharge persons from the enstedy of state officers, where it appears that they are hold under a state law which seeks to punish them for executing a law of the United States, or where the act for which they are held was done in pursuance of the process of a Federal court. Ex parts Waddy Thompson, 522.

10. But where a party is in custody of a state officer under an indictment for largery and sets up as a justification for the act complained of a writ of replevin issued from a United States court, the latter court will on habous corpus inquire into the fact whether its writ was fraudalently obtained for the purpose of carrying off the property, and if satisfied of that fact, will remand the select to the custody of the state officer. Id.

11. A writ regular on its face is a justification to the officer to whom it is addressed for everything that he may lawfully do under such an authority, but this rule does not extend to a party who has procured the writ by fraud. Id.

12. If the highest court of a state has, after judgment, sent its records to an inferior court, and no longer has them in its own passession, the Supreme Court of the United States may send its writ either to the highest court or to the inferior court. Atheren v. Fouler, \$60.

13. Although jurisdiction cannot be given to the United States courts by the concent of the parties, they may admit the existence of facts showing jurisdiction upon which the courts may judicially act. Railway Co. v. Ran-

sey, 192.

COVENANT. See WARRANTY, 1.

1. A stipulation in a deed of conveyance, whereby the grantee, in part consideration for the conveyance, agrees for himself, his heirs, and assigns, that the premises conveyed shall not be used or occupied as a hotel, so long as cartain other property, owned by the granter, shall be used for that purpose, binds both the grantee and all claiming under him, and may, in equity, be enforced by injunction. Stines v. Derman, 121.

2. Where a builder has done a large part of the work, but yet has failed to

COVENANT.

complete a building within the time limited by his covenant, the other party can cither abandon the contract, or permit the party in default to go on, and if he does the latter, he cannot afterwards set up the breach as a de an action for the contract price. Construction Co. v. Segmon, 553.

3. For the injury done by the failure to perform in the stipulated time, he may recover in a suit on the contract, or he may recoup, in an action on the

contract against him, for the price. Id.

4. In an action of coverant founded solely on a specialty, evidence of a parol promise is inadmissible. M.

CRIMINAL LAW. See Factor; Intoxicatine Legeons, 2, & Y. Genernily.

1. Liability to criminal punishment without criminal intent. Note to Calted States v. Adler, 48.

2. The burden of showing that a confession of guilt was obtained by huproper inducements rests with the defendant. Rufer v. The Sute, 120,

3. Where a witness is offered by the state to prove a confession made by the defendant, to the admission of which testimony the defendant objects, on the ground that the confession was not voluntary, it is the right of the dofendant to inquire of the witness and prove his objection before the conis given in evidence. M.

4. A verdict in a criminal case, where there has been neither arraignment

nor plea, is a nullity. Davis v. The Shete, 186.

3. After such a verdict, the court cannot order a plea of " not mility" to be entered without the defendant's concent. Id.

6. A judge has power to suspend sentence, where the circumstances, in his opinion, render the offence trifling and the law has imposed no mini

punishment for it. Wenter v. The People, 831.

7. In general, where a sentence has been emitted by the judge who tried the case, another judge may impose the proper sentence at a subsequent time, but where sentence has been suspended by a judge under circumstances that indicate his opinion that no punishment should be indicate, a subsequent sentence by a different judge is erroneous. H.

8. Michogopical Examination of Blood in its Relation to Chine.

WAL TRIALS, 561.

H. Merder.

9. Drupkenness as an Extendation in cases of Murden, 305.

10. Where it is shown that two or more persons acted in concert in the commission of an alleged murder, it is competent for the state by proper tes-timony to show, upon the separate trial of one, the motives which astusted the others in the alleged homicide. Refer v. The State, 120,

11. On a trial for marder it was competent to give evidence, for the pur-pose of showing motive, that the prisoner and the deceased both visited the same women; that just after the homicide the prisoner said he had werned deceased not to visit her, she would prove a cures to any man, and now had come to pass. McCue v. Commencesith, 377.

12. Unless the Commonwealth shows "ingredients" of murder in the first degree, no presumption arises from the killing that the offence is higher than murder in the second degree. M.

18. If the killing was not accidental, malice and a design to kill are to be

presumed from the use of a deadly weapon. M.

14. Where upon a conviction of murder in the first degree the record desc not show that before sentence the prisoner was saked if he had anything t say why sentence should not be pronounced, it is error, and the sentence w be reversed and the record remitted, that he may be sentenced afresh. M.

III. Assest and Bettery.

15. To make it competent for a party complained of for usesalt and battery, show that the person assaulted was quarrelrome and fraction that be had knowledge of such fact. Thate v. Mander, 86.

16. A porty associated in such a way as to feduce in him a resonable b

CHIMIXAL LAW.

est he is in danger of lealing his life, will be justified in definiting himself. Booch 4. The People, 441.

IV. Folor Presence.

17. Where a loon is induced by the fraud of the borrower, and the londer Selivers cortain bank bills without any expectation that the same bills will be returned in payment, the borrower is guilty of obtaining money by false presences, but not of larceny. Kellogg v. The State, 499.

CUSTOM. See Usasz.

DAMAGER. For Action, 2; FERRY, 3; Malicious Procecution, 3-5; Master and Servant, 1; Keslighter, 1-8; Teorer, 4.

1. Municipal corporations are not liable to vindictive or exemplary das for personal injuries growing out of more neglect to keep a sidewalk in a safe

ition. Chirago v. Kelly, 249.

2. Where a person, on the commission of a wrongful act, becomes link aly in consequence of his subsequent approval or sanction of it, he will be Hable only for the real injury sustained, and will not be subject to vindictive demagns. Grand v. Von Virch, 249.

3. Exemplary or punitive demages in test can only be recovered whose the injury is the result of wilful misconduct, or a conscious indiffi

ness. Milworker & N. Peul Railroad Co. v. Arms, 288.

4. In no case has a plaintiff ony legal right to exemplary dama damages depend upon the case and the evidence and the Sading of the jury.

Jerome v. Smith, 667.

- 3. Where the plaintiff, in pursuance of an agreement with the defendant, formished the materials and constructed a carriage for the defendant, in accordance with his order and directions, for which a stipulated price was to be paid, and the defendant referred to receive and pay for it when completed and tendered: Ifold, that in an action brought for that purpose, the plaintiff is entitled to recover the contract price and interest from the time the money should have been paid. Absorben v. Von Nest, 183.
 - 6. The subject of damages in such case discussed. M., not., 160.

DESTOR AND CREDITOR. See Application of Pathents; Equity, 4, 5. L. Assignments.

1. In case of an assignment of choses in action for the benefit of creditors. the law of the domicile of the assigner determines what is a sufficient transf to authorize the assignee to collect the same. Fuller v. Reiglitz, 742,

2. An essignee is a trustee for all creditors whether secured or not. Mailg's Appent, 618.

II. Fraudulent Concegences or Boles. See Huenaup and Wirn, 16-19.

8. A sale of goods is franciscent as to creditors, where persession is retained by the render. Catting v. Jackson, 681.

4. Nor does it alter the case that the sale was made in the presence of a witness, where it was not attended with such publicity as would naturally give notoriety to the transaction. M.

5. Upon the sale of a chettel a reservation that the render should still have

the right to use the thing sold constitutes a secret trust, from which frank as to the creditors of the vender is an informed of law. Long v. Stockwell, 121.

6. The assignment of a collateral security to a creditor establishes a privity of contract, which levests him with the ownership of the collateral for all purposes of dominion of the debts assigned. Henne v. Helton, 441.

7. When the collateral is lost by the insolvency of the debter in it, through

the sepine negligence of the creditor, he must account for the less to his own debter. M.

DEED. See BOUWDARY; EASENERY, 8, 14.

1. A particular description in a dood will govern a general one. Flatcher v. Clark, 749.

2. The conditions upon which an more is to be delivered to the grantee may rest in perct. Complett v. Thomas, 940.

DEED.

2. When the grantor still retains the right of control over the deed, it is not an escrete. Campbell v. Thomas, 249.

4. A dead deposited by the granter with a third person is not an engrow unless there is a valid contract of sale between the granter and grantee. Id.

5. There can be no delivery of a deed so long as it is within the control

and subject to the authority of the granter. Duer v. James, 441.

6. The delivery may be to a third party authorized to receive it, and it may be inferred from the words or acts of the party or both combined. M.

7. On appeal from a decree reforming a deed on the ground of mistake, the true construction of the deed is before the court, as well as the sufficiency of the proof of the mistake. Fryer v. Patrick, 311.

3. The regularity of an acknowledgment taken before a reputable efficer is presumed, and the burden of showing forgery or other tregularity is with the party contesting the acknowledgment. Hourtisms v. Science, 378.

DISTILLED SPIRITS.

1. The offence of failing to effect and obliterate the stamps required by law to be upon a parkage of distilled spirits at the time of emptying the package in complete without any intent to defraud, or any purpose to violate the law. United States v. Adler, 43.

2. If a person causes a package of distilled spirits to be emption, it is a personal duty resting upon him to see that the stamps are effected, and this duty cannot be shifted from himself by directing another to do the same for him. Id.

DIVORCE. See HUSBARD AND WIFE, L.

At common law an owner of a dog must have knowledge of its vicis propensities to be liable for its acts. Blinger v. Honosmen, 186.

DOWER. See HUSBAND AND WIPE, IL.

DRAFT. See Bills and Notes, 19-31; Bill of Lading.

DURERS. See Insurance, 21.

1. A promise extersed by terror or violence, whether on the part of the person to whom the promise or obligation is made or that of his agent, may be avoided on the ground of duress. But v. Brewn, 85.

2. If a party execute an instrument from a well-grounded foar of Megal

imprisonment, he may avoid it on the ground of durest. Al.

8. A raie made through fear of arrest on a writ of trover may be avoided, and it is not necessary to offer to rescind. Brownell v. Tulcott, 55.

1. The English doctrine of presumptive title to light and air, arising from the uninterrupted enjoyment of it for twenty years and upward, was part of the common law of England and of the colonies at the period of American independence, and as such continued to be the law of Delaware. Classes v. Primrose, 5.

2. How for the common-law rule in regard to ancient lights has been

pood in the United Brates, discussed. M., note.

8. A court of equity will restrain the obstruction of lights by erections on adjoining land, even where the right is unquestioned or established, only whon the privation of light and air by a proposed creation will be in such degree as to render the compation of the complainant's house uncomfertable, if it be a dwelling-bouse, or if it be a place of business the privation must render the exercise of the business materially less beneficial than it had fermerly been. At

4. A fair test of what is such a privation of light, &c., is the fast that a

jury would give submantial and not morely nominal damages. At.

5. Where a common owner of two tenements, the windows of one of which everlook the yard of the other, and receive light and air therefrom, its shutters swing out over such yard, and necess from its fire-escapes which overha yard being had to such yard, asvers the same by couveyances to d

BASEMENT.

persons, an easement in favor of the tenament so overlooking the other, it sing the one first conveyed, is created in respect to light and eir, the swinging of the shutters, and access to and from the fire-escapes. Havens v. Klein,

6. Such easement is an apparent one. The grantee of the servient tenement, the one later conveyed, is deemed to have actual notice of such caseet, and takes his title subject therete. Id.

7. In such case it is immaterial whether such severance be by dead or mort-

gage, incomuch as by forcelosure the mortgage is ripened into a deed. Id.

8. An equeduct not having become a legal easement, will not pass under

the word appurtenance in a deed. Spaniding v. Abbot, 121.

9. Land which is covered by a party-wall remains the several property of the ewner of each holf, but the title of each is qualified by the easement of he other of support of his building by means of the portion of the wall be-

Isaging to his neighbor. Inguls v. Flamenden, 220.

10. The easement of support is the only proper one attached to a party-wall, and does not include a right to the unobstructed use of a fine by one of the parties which is on the land of the other. M.

11. The common-law rule is that where the owner of two heritages, or of

- one consisting of several parts, arranged and adapted them so that one derives a benefit from the other of an obvious and continuous character, and then conveyed one of them without mentioning such incidental advantage or burden of the one in respect to the other, there is an implied agreement that such dvantage and burden shall continue as before the separation of the estate.
- 12. In order to affect a purchaser of property with notice of an ensement in favor of an adjoining owner, the same must be continuous and apparent.

13. The subject of apparent easements discussed. Id., sate, 226.

14. Easements of necessity are implied in every dood of a part of granter's land, but whether a right of way in stairs and balls is implied by a conveyance of part of a house, quere. If such easement exists it is a mutual one, and the permanent exclusion of one party by the other will at the option of the latter extinguish the easement as to both. Dillmon v. Hoffman, 196.

13. A party having conveyed a portion of his land over which was the only means of access to the remaining land, a right of way by necessity to the remaining land was reserved. Lingres v. McDuffle, 624.

EMEMENT DOMAIN. See Constitutional LAW, III.

EQUITY. See Contract, 6; Corporation, 1, 7, 11, 12; Deed, 7; High-WAY, 2, 3; VENDOR AND PURCHASER, 8, 8, 9.

1. It is the proper exercise of equity jurisdiction to apportion among parminon interest in the use of a water power, the burden and ties having a co

expense of such duty. Sentern v. Braley, 84.

2. A chancellor will not always order an instrument to be delivered up to be cancelled when he would refuse specific performance of the contract; he will leave the parties to their legal remedies. Stewart's Appeal, \$12.

8. This power will be exercised whenever an instrument exists which may be rexationally or injuriously used against a party after the evidence to impeach it has been lost. Id.

4. A creditor who has exhausted his remoty at law by a fruitless execution on his judgment has the right to ask the aid of a court of equity to discover and reach the equitable assets of his debtor. Treps et al. v. Skinner, 517.

. S. In such a case where property has been fraudulently conveyed, the several persons to whom it has thus been conveyed may be joined with the del . In the bill. M.

6. Where the facts stated in a petition are within the sole jariediction of a cours of equity, neither party can of right demand that the issue of fact shall be tried by a jury. Reciond v. Entreken, 352.

7. Clear and convincing proof is required to warrant the reformation of a written instrument on the ground of mistake. Potter v. Petter's Estat, 300.

EQUITY.

8. In proceedings in equity, whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, must be alleged positively in the bill. Such convenient degree of certainty must be adopted as will give the defendant full information of the case which he is called upon to answer. Rice v. Hosiery Co., 608.

3. The more receipt of money by a party not entitled, cannot of itself create any equity in his favor. The Prople v. Tomphip Beard, 448.

10. Where a father made a conveyance of all his lands to his five sons up he consideration that he was to have the use and control of the same during life, for his support, a court of equity will enforce the performence of the condition. Fortum v. Frakum, 442.

11. Where complainants have fixed by their own estimate the extent of injury they would suffer from a non-observance of the condition in a contract, they are precluded from resorting to a court of equity for relief by way of

injunction. Ilaka v. Concordia Society, 442.

12. A hill of review is never sustained on strict law against equity.

Marr's Appeni, 312.

13. To a bill in Rhode Island charging the collection of money by defi ant he answered that he was administrator in Massachusetts, and collected as such. Ileid, that in the absence of explicit denial it would be presumed he collected size as administrator in Rhode Island. May v. Samuel, 701.

14. Where there are joint debtors and one is beyond the reach of the process of the court, and equity has jurisdiction, a decree may be taken against

the other for the whole amount due. Louis v. United States, 678.

18. It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the

16. In general, one who will be directly affected by a decree in equity, is a necessary party to the suit; and this rule is departed from only when the parties are too numerous. Where the grounds of action averred against several defendants arise out of a series of transactions forming one course of dealing, the bill is not multifurious. Supervisors of Donglas Co. v. Walbridge

et el., 250.

17. The objection that a case is one of legal instead of equitable cogni-- sence must be taken in the court of original jurisdiction. Wallace v. Horris,

187.

- 18. Where plaintiff invested his funds in United States notes temperarily and for the purpose of avoiding taxation, equity will not aid him by enjoining the state authorities from collecting the tax. Mitchell v. Comm ; . 554.
 - 19. To enable a court of equity to entertain a bill filed to restrain a fendant from violating a contract, the terms of the contract should be corte Caserll V. Gibbs, 441.

ERROR AND APPEAL. See Trial, 1.

1. A party excepting to the admission of testimony is bound to state his

objection specifically. Columbia Bridge Co. v. Geisse, 122.

2. On a judgment of nonexit the court below being better able to judge of the force of evidence, a court of error will not reverse unless it should plainly appear that the plaintiff had a case that should have gone to the jury. Mor-

erly v. Mercer, 443,

3. The power of a judge to seal or allow a bill of exceptions onde with the term at which the trial is had, unless there is an express order of the court extending the time or the opposite party consents. Mullier v. Ellers, \$54.

4. An order of the Circuit Court reversing a judgment of the District Court and awarding a new trial for misdirection on the law, is not a final judgment on which a writ of error will lie. Buler v. White, \$64.

5. A reviewing court on error has no control of the records of the court below, and second therefore correct or change them. South v. Brard of Education and second therefore correct or change them.

helow, and cannot therefore correct or change them. Suit v. Beard of Edo. detion, 354.

6. A reviewing court may, however, disregned any metter which is not

BEBOR AND APPEAL

7. What shall constitute the record of a case is regulated by statute.

Buith v. Board of Education, 884.

8. When a motion for a new trial is granted by the court in which it is nade, the judgment rendered on the new trial will not be reversed for error in allowing such new triel. M.

9. The court will only notice such assignments of error as seem to it mate-

rial. Phillips Construction Co. v. Separeur, 888.

ESTATE. See TRUST. 2.

ESTATE TAIL. See Constitutional Law, 9.

ESTOPPEL. See Limitations, Statute of, 6.

1. Where the owner of property holds out another as its owner, and inne-cent parties are thus led into dealing with such apparent owner, they will be od. Anderson T. Armistead, 250.

2. One who has repudiated a contract is estopped from afterward claiming

the benefit of it. McQueen v. Gamble, 878.

EVIDENCE. See Acast, 11-18; Coumon Carrier, 6; Criminal Law, 2, 8-11; Husband and Wife, 18; Indurance, 8; Linitations, 4; Trial, 8. · L. Generally.

1. Parol evidence is admissible to prove an independent colleteral fact about which a written contract is allout. Fusting v. Sullinen, 56.

2. A deed described the land thereby conveyed as being in "Lington," in the county of Addison. Held, that the name "Lington" was on like the name Lincoln, that the deed was properly admitted in evidence. Armstrong v. Cobs, 54.

S. In an action against a telegraph company for damages for fallure to transmit a dispatch, the original dispatch delivered to the operator must be given in evidence, or if not, its absence must be properly accounted for before secondary evidence thereof can be admitted. Western Union Tolograph, Co. v. Hopkins, 36.

4. The legislature may make that which, according to the ordinary rules of experience, reasonably tends to prove a fact, conclusive evidence of it.

bate v. Woodford, 311.

3. Defere parties were made competent witnesses, books of original entry were the evidence, the eath of the party was supplementary. Bince, the party is a competent witness and may prove his claim as a stranger would have done before. Nichols et al. v. Hayara, 878.

6. Lumping charges in a book would not stand as ovidence, but the testimony of the party that the entry was composed of items known to him to

have been furnished would be competent to go to the Jury. M.

7. The party's knowledge that the sum was correct would make it evi-

dence; the credibility as to it would be for the jury. Id.

3. In a suit by an executor or administrator, the letters testamentary are administrator, the right to suc. Matual Life Inc. Co. v. Tiedale, 412.

9. But in an action between strangers, such letters are not admissible as gridenes of the death of the decedent. Id.

10. In an action by a wife upon a policy of incurance on the husband's life in her favor, letters of administration are not evidence of the husband's

11. Where in an action for libel it appeared that the original writing on which the suit was founded was among the records of the navy department at Washington, it was held, that secondary evidence of its existence and contents was properly admitted. Curpenter v. Builey, 621.

12. In replevin brought against a wife upon a liability incurred by her hashand, who had absounded, testimony of what the husband had said and done was inadmissible, unless the acts or statements but been in her presence or with her knowledge. Complet v. Quasientoni, 850.

EVIDENCE.

11. D. clarations and Admissions.

12. In trover, the defendants claimed title to the property through B., who turned it over to them to secure a then existing dobe. Iteld, that the declarations of B. were admissible against the defendants. Alger v. Andrews, 56.

III. Esperta.

14. The opinion of persons not experts, upon the question of inscriby, is admissible in Vermont, when based upon facts within their knowledge and observation. Hathaway v. National Life Inc. Con 602.

EXCHANGE

A warranty of title is implied in a contract of exchange as in a contract of sale. Potes v. Poiton, 742.

EXECUTION. See Corplict of Laws, 8, 8, 8; Partheneuty, 6.

EXECUTORS AND ADMINISTRATORS. See Coursessars States, 11 Bridgerce, 8.

1. The appointment as administrator de busis non, with the will ennemed, of one who was surery on the hand of the previous executor, does not make a debt due the estate from such executor assets in the hands of such admissistrator by reason of his suretyship. Shields v. C.fall, 748.

2. An executor or administrator cannot bring suit against himself for a

debt due him by his decedent. Perkins v. Perkins, 493.

A commission merchant who sells for his consignors, even though he guaranty the payment of the price, receives the proceeds of the sales in a fideriary expecity, and is liable to arrest in an action therefor, unless he has been contracted by his constant. been authorized by his consignor to use such proceeds in his own business. Williams Moster Co. v. Rigner, 251.

PALSE PRETENCE. See CRIMINAL LAW, 17.

FENCES.

A railroad company, though required to maintain side-funcing, is not Hable for the destruction of eattle suddenly let lease upon the track through a breach in the fencing caused by a storm, and not existing long enough to establish negligeness of the company. Robinson v. Grand Trunk Railway, 187.

1. The legislative grant of a ferry-franchise is valid, although the grantee has not title to the landing-places which are named as the termini of the

Columbia Bridge Co. v. Gelser, 123.

forry: Columbia Bridge Co. v. transer, suc.
2. The grant by one state of a ferry-franchise over a river which is the there be enneurrent action by both states. The franchise for that reason may be less valuable, but it is good so far as his own property-righte are sencerned, or the jurisdiction of the state making the grant extends. Id.

8. In an action to recover demages for the injury suffered in the destruction of a ferry by the erection of a bridge, the income derived by the plaintiff from tolls received in preceding years, is competent oridence to show the

value of the ferry. M.

FOREIGN JUDGMENT. See Complied of Laws; Constitutional Law.

1. The jurisdiction of a foreign court over the person or subject-matter to always open to inquiry, and the court of another state to a fereign court. Hall v. Lanning, 662.

2. A member of a partnership firm, reciding in one state, cannot be readered personally liable in a suit brought in another state against him and his co-partners, although the latter be duly served with process, and although the law of the state where the suit is brought authorises judgment to be rendered against him. H.

8. Nor can his co-partners, after a dissolution of the partnership, without his consent and authority, implicate him in suits brought and the firm his

PORFEITURE. See Confiscation.

The subject of forfeiture and confirmation of enemy's property under the Acts of Congress discussed. Note to Wallach v. Van Riscick, 837.

FORMER ADJUDICATION. Res Action, 1.

1. A privy in interest for whose use and with whose knowledge a sult is brought is concluded by the judgment, not only as to the defendant, but as to the nominal plaintiff. Cole v. Farerite, 251.

2. One who fails to have a Judgment set aside for fraud, is not deharred from contesting at law a void execution sale by not having put it in issue in his chancery suit. Benker v. Charlescorth, 187.

8. A complainant may, if he chooses, make distinct controversies on the

same matter, the subjects of separate suits. Id.

4. To be a bar, must be for the same course of action, but not necessarily in the same form of action. Ilungerford's Appeal, 79.

PRAUD. See Attorney, 3; DERTOR AND CHAPITON, at., 1. Is not sufficient to 1. Where on account is asked on the ground of fraud, it is not sufficient to Morr's parge fraud in general terms; particular acts should be stated. Merr's Appeal, 312.

. Fraud without damage is no ground for relief at law or in equity. H.

3. Frand used in obtaining a decree, being the principal point in lasue, not be established by proof before the propriety of the decree can be investi-

gated. H.

4. Fisher sold a house to Saylor, agreeing to make good any loss of Saylor in a resale. Saylor sold for less than he gave. In an action against Pisher for the difference there was evidence that the sale of Raylor was collusive and fraudulent. In answer to a point the court charged, if there was any collusion between Baylor and his rendes in the sale then Baylor "cannot recover more than the difference between a fair price for the house and the amount paid to Fisher." Held to be error, the fraud would prevent Saylor from maintaining the action. Fisher v. Saylor, 312.

FRAUDS, STATUTE OF. See Accord AND SATISFACTION.

1. PARTNERSHIP REALTY IN ITS RELATION TO, 321.

2. CONTRACTS RELATING TO THE PRODUCE OF LAND, 328.

3. The general rule is that a parol promise to pay the debt of another is within the statute where it is collateral to a continued liability of the original debtor. Townsend v. Long, 27.

4. If a parel promise he to pay absolutely or conditionally the debt of nother, due or to become due on an existing contract, it is generally within

the statute. M.

- 5. The consideration for the promise is important only where it is a transfer of the ereditor's claim to the promisor, making the transaction a purchase, or where it is a transfer of a fund pledged, set apart or held for the payment of the debt. Id.
- 6. Where K. & W., by a parol agreement with a certain bank, promise hat if the bank will cash a certain draft to be drawn by and in the name of a ertain agent of theirs upon S. L. & Co., that said K. & W. will be responsible for its payment, and afterwards such agent does draw such draft and the said bank cashes the same, and afterwards said draft is dishonored by said S. L. & Co.: Hold, that the bank may maintain an action to recover from mid K. A W., on said perol promise, the amount paid out on said draft, with sterest. Koln v. First National Bank, 318,

7. Evidence to prove a premise to pay the debt of eaother as an original fortaking and not a contract of suretyship, must be clear and satisfactory.

Maceria v. Mercur, 448.

1. The delivery of a chattel must be according to the nature of the article. Bond v. Busting, 878.

2. The Married Weman's Act, April 11th 1848, of Pennsylvania con-

2. A person does not part with the legal dominion and control over money

GIFT.

standing in his name in a bank, herause it was there subject to his order, or the order of his drughter; nor does the delivery of the book of deposit coaststute a delivery of the money. Marry v. Cusan, 57

4 As to gifts of chattels without delivery, see note to Rog v. Simuses, 705.

GOLD. See INSURANCE, 18.

GOVERNMENT. See COMSTITUTIONAL LAW, 1, 38; CONTRACT, 16.

1. A government de forte, in firm possession of any country, is clathed while it exists with the same rights as a government de jerq. Phillips v. Payer, 683.

2. For certain purposes the states of the Union are regarded as foreign to

each other. M.

3. The state of Virginia is de facto in possession of the county of Alexandria, and her title has been undisputed since she resumed possession under the Act of Congress of July 1th 1846. The United States has no power, therefore, to consider the legislation of Virginia in reference to the county of Alexandria as void and of no effect. M.

GUARANTY.

1. The obligation of one signing and scaling a guaranty, which it was intended should be signed by him alone, is not impaired by the fact that the guaranty concluded "in witness whereof we have hereunte set our hands and affixed our seal. Mitchill v. McCleary, 379.

2. If a guaranty is absolute, and not a more offer to guarantee, notice of its acceptance is not required to make the guaranter Hable thereon. M.

3. To constitute a valid guaranty, there must be a sufficient consideration, a delivery by the guaranter, an acceptance by the person to whom it is given, a subsequent delivery of guarantee or other property under and in accordance with terms, and, if it is collateral, request of payment and notice of non-payment. March v. Putney, 499.

4. Notice is not necessary when the undertaking is absolute. Il.

5. Where the person for whose benefit the guaranty is given becomes insolvent, so that no advantage can arise to the guaranter, notice is unnecessary. Id.

GUARDIAN AND WARD.

1. A guardian may within a reasonable time be called to file and settle his account, although he may have made a settlement with the ward on his ac-

rival at ago. Marr's Appeal, 312.

2. Where there was a settlement with the ward, and a release to the guardian after she came of age, and on the joint application of the ward and her guardian, a decree made discharging the guardian, the decree could not be vacated without proof of some specific act of fraud in obtaining it, or of tome injury occasioned by it. Id.

HABRAS CORPUS. See Courre, 9, 10.

Habras corpus is not the proper remedy where the relater has been convicted and sentenced for a criminal offence; if errors have accurred in the proceedings or sentence, a writ of error is the proper remedy. As parts Von Magan, 128.

HAWKERS AND PEDLERS.

1. The legislature under the police power might prohibit entirely the business of hawking and peddling; and the power to prohibit includes the power to license. Marrill v. The Sutr, 100.

2. Act of 1870 of Wisconsin construed. M.

REIR. See Courtect or Laws, 7.

MIGHWAY. See MUNICIPAL CORPORATION, 1, 2,

1. As to Act of April 20th 1870, of Pannsylvania. Bee City of Philadel-phis's Appeal, 518.

2. In a bill for injunction, if the question is doubtful, it is desirive against

the injunction. L.

MEVAT.

2 No uses, however long rendered, will justify an environment upon a Mighraps: but such environment, to be remotived by injunction, must be seedly an elementum to the free me of the highway. City of Philadelplac's Appeal, 312.

MESTRAD

1. Under the low of Wisconsin only the actual house of the delter is encupt, and the shorare which will not destroy the exemption is one for a temporary purpose, with the certain intention of returning. Juryle v. Mes,

2. A pursue cannot have two bounts at the rame time; and such a removal on galor a new bount is an absorbingment of the old. M.

2. The pre-ampairm is that a person is at home where he is found living ! but the presumption may be released by showing his abode temperary, and he home cherebore. M.

MBAND AND WIFE. So Evenues, 19, 12; Ingrades, 19-61; Les-STATUSER, STATUTE OF, S.

L Morroy and Drawn.

- 1. Where so illiest connection has once existed, the procumption is that the association between the parties continued to be illicit, until that presumpin to overcome by distinct proof of marriage. Bornon v. Bornon et al EL.
- 2. Marriage may be proved in civil cases, other than actions for solution, by repairmen, declarations and combact of the parties; but where reputation in such case is divided or singular opinion it amounts to no evidence at all.
- 3. The declarations of a mother as to the tearriage of her see, are admitted to he after her death, to show that one who claimed and was admitted to he his see, was Elegislands. M.

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IL Daw.

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9. Under the Ohio Dower Act an estate sourced as jointage must be such as estate, as to certainty and kind, that the wife, on the death of her husband, may take personnian of, and hold in severalty, and not in common with other

on Gregor v. Garrison, 630.

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v. Gerrison, 682.

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18. In a proceeding to have a deed declared fraudulent and void as against

the rights of the widow of the granter, his declarations to the conveyancer with respect to the deed, and his object and purpose in making it, being con-temperaneous with its preparation and execution, are admissible in evidence. Benbern v. Long, 87.

III. Separate Estate. See BANKRUPTCY, 90; G1FT, 2.

14. A wife may charge her separate estate to pay her busband's debts.

Rephen v. Bonie et us., 282.

15. Where articles of household furniture were purchased by a husband for his wife, and she agreed to reimburne him, having a separate estate, it was held that the agreement was valid. Mgore et al. v. King, 814.

16. A gift from a harhand, who is insolvent, to bis wife, is in projection of the rights of subsisting creditors, and she takes no stele. Id.

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13. In order to defeat a settlement made by a hashand upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are

expected shortly to supervene, or creditors whose rights may and do so supervene. Built et al. v. Vadges, 748.

19. As to part payment for property by wife and part by insolvent husband, see Shraffer v. Fithing, 684.

20. Where land was bought and improved by a wife with money acquired before marriage and with her subsequent exrange, and the husband acquierors murrings and with nor sunsequent earnings, and the husband acqui-esced for Shoon years in her holding the land in her own name, it was fall that in a contraversy between the newless offer a district name, it was fall that in a controversy between the parties after a diverse, the property belonged to the wife. Jackson v. Jackson, 887.

IV. Contracts and Conveyances.

- 21. The contract of a married woman to pay for serviced of an attorney in prosecuting a libel for divorce against her bushend is not blading. Whipple 7. Giles, 118.
- 22. A merried women sannet bind herself by a more personal contract at that an action can be maintained against her after the coverture has cancel. nor will such contract he implied against her by reason of services readered during her coverture. H.

22. As to statutory validation of previous conveyance of land, by husband

and wife, see Randell v. Kreiger, 800.

24. Weyman, by parel bought land from O'Hara, took possession, made improvements and paid part of the purchase-money. His wife horsewed the remainder of the purchase-money from Butterfield, paid it to O'Hara, who made the deed to her, and she mertgaged to Butterfield, the husband not joining. Hold, that the husband owning the equitable title, could not compel a conveyance of her legal title without refunding the purchase-money the had made. Betterfields Annual 192 paid. Butterfield's Appeal, 188.

25. Besterfield recovered judgment against the wife on his mortgage; the lead was sold by the shoriff on a municipal claim against both husband and wife. Bird, that this divested the title of both and in the distribution of the proceeds, Butterfield was entitled on his judgment to recover the amount of the wife's interest in the fund, being the purchase-money which she had public.

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IDEM SONANS. See Bribares, &

IMPANT. See Messessen: Paners and Custo.

1. Where influte purchased land and gave y

MICHWAY.

2. No usage, however long continued, will justify an encroachment upon a highway; but such encroachment, to be remedical by injunction, must be really an obstruction to the free use of the highway. City of Philadelphia's Appeal, 212.

MOMESTEAD.

1. Under the law of Wisconsin only the actual home of the delter is exempt, and the absence which will not destroy the exemption in one for a temperary purpose, with the certain intention of returning. Jarvie v. Mee, 188.

3. A person cannot have two homes at the same time; and such a semoval

as gains a new home is an ahandonment of the old. Id.

3. The presumption is that a person is at home where he is found living ; but this presumption may be rebutted by showing his abode temperary, and his home elsewhere. Id.

MUSBAND AND WIFE. See Evidence, 16, 19; Indusance, 19-61; Len-Stations, Statute of, 5.

L. Marringe and Direcer.

- 1. Where an illicit connection has once existed, the presumption is that the connection between the parties continued to be illicit, until that presumption is overcome by distinct proof of marriage. Barnum v. Burnum et al., 279.
- 2. Marriage may be proved in civil cases, other than actions for seduction, by reputation, declarations and conduct of the parties; but where reputation in such case is divided or singular opinion it amounts to no evidence at all.
- 3. The declarations of a mother as to the marriage of her son, are admissible after her death, to show that one who claimed and was admitted to be his son, was illegitimate. Id.
- 4. General repute in a family, proved by surviving members of it, is ad-
- missible upon a question of marriage. Id.

 5. Upon a question of legitimacy the declarations of a father that his son was illegitimate are competent evidence. Id.
- 6. A decree pro confesso cannot be made upon a libel in divorce. If either party does not attend, the court must decide on testimony taken as parte. Kilbern v. Field et ur., 200.
- 7. A contract between husband and wife, pending preceedings in divorce, to pay her a sum of money, the consideration of which was, in whole or in part, that she would not oppose the divorce, is void. Id.

II. Dower.

8. A father died, leaving a widow. His homestead descended to his two sons. In consideration of their having the use and income of the whole estate, the sons, in writing, premised the widow an occupancy of a portion of the premises, and certain farm stock for her use, and a certain yearly payment. Afterwards, one son conveyed to the other. The latter then conveyed the entire premises to his mother by a warranty deed. Then he died, leaving a widow. In an action of dower by the widow of the son, against the widow of the father, it was held, that there are two dowers in the cotate; the senior widow having one-third of the whole, and the junior widow one-third of the remaining two-thirds, as dower; and that the junior widow is not now, nor will she be at the death of the senior widow, downhie in any greater proportion thereof. McLony v. McLony, 424.

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IDEM SONANS. See Evenence, S.

DEFANT. See Missessen: Panust and Custo.

1. Where influte parabout lead and gave pu

INFART.

beir electing to retain possession after reaching their majority, was a ratifica-

tion. Calles v. Day, 189.
2. Where an infant purchases a chattel and gives a purchase-money mortgage, he cannot, on the ground of infency, avoid the mortgage without also evolding the purchase. Carties v. McDoupell, 200.

3. Plaintiff was present and assenting when his minor daughter entered

into a contract in writing with a school heard, as teacher, which was signed by her in her own name, and not by him. In the absence of other proof of any intention on his part to relinquish his right to her wages: Ifold, that he pay maintain an action against the board for such (unpaid) wages. Monam v. School District, 232.

4. As to the School Act of 1872 of Wisconsin. Id.

ENJUNCTION. See CONTRACT, 6; COVENANT, I; EQUITT, 11, 19; IIIOM-WAY, 2, 8; WATERS AND WATERCOURSES, 2.

INNEEPER. See Railmoad, 7, 8.

INGANITY. See Evidence, 14: Insurance, 22: Will, 1.

INSOLVENT. See Corporation, 25, 26, 31; Destor and Creditor.

INSURANCE. See Corporation, & Evidence, 10; Bet-off, 5; War, 1.

1. Where a policy of incurance containing an acknowledgment of the receipt of the premium, has been issued and delivered to the assured, the insurance company will not be permitted to allege a want of con-ideration for its promise when sued thereon, after a loss has hoppened. Ins. Co. v. Cashow, 58.

2. A life-policy reciting the payment of the first quarterly premium cannot be disproved by the insurance company. Teutonia Life Inc. Co. v. Moller,

444.

3. The testimony of exports and particularly of underwriters is always admissible upon the question of the materiality of circumstances affecting the

rick. Level v. Inc. Co., 532.

4. Where property is insured, and the insurer re-insures, and it is destroyed by fire, and before the loss is paid, the original insurer becomes bankrupt, and the secured receives but a small dividend out of the hankrust's estate. the re-insurer is still liable to pay the whole amount of the re-insurance to the trustee of the original insurer, without deducting the dividend, and the original assured has no claim in respect of the money so paid. Consalidated Bee. Co. v. Cardon, 58.

5. On a bill of interpleader fied in a Maryland court, to settle the conflicting claims of two parties under a policy of incurance made payable in Philadelphia, growing out of an assignment of the policy made in the city of New York, both parties having appeared to the suit, the case must be disposed of according to the law of Maryland. Whitridge v. Barry, 830,

II. Conditions, Je., in Policies.

6. An over-valuation of property by the insured, is a fraud upon the in-prance company that avoids the policy, but it is a question of good faith.

Tre Ins. Co. v. Venglan, 885.
7. Policies like other contracts, are to receive a reasonable construction, so so not to defeat the intention of the parties. West v. Citizens' Inc. Co.,

309.

8. A policy issued to a mercantile partnership on a stock of goods owned by the firm and with which they are carrying on business is not avoided by a sale by one partner to his copartners, who continue the partnership business, of his interest in the stock of goods. Id.

9. In case of loss after such sale and transfer, the remaining partners, being the real parties in interest, should sue on the policy, and in such action they are not limited in the amount of recovery to their interest in the partnership goods before such sale and transfer, but oen recover for the whole loss. M.

10. A policy of incurance which contains a condition that the insured pri . prote staff not to alianated or encombered may be avoided by the formy

r.

IMSURANCE.

where a sale or encumbrance is effected without his concent. Home Inc. Co. v. Lindsey, 485.

11. In an action on a policy of insurance which contains a condition, the

petition must allege performance of the condition. M.

12. A policy that if the interest insured be not in fee simple in case of real estate, or absolute as to personal property, such must be made known to the company, and expressed in the policy, means when the united interest of the insured in the property was less then absolute. Reakin v. Ander Ins. Co., 58.

13. The owner may sue in his own name, although it may be written on e face of the policy: "Loss, if any, payable to A. B., as mertgages."

Martin v. Franklin Fire Ins. Co., 220.

14. The direction on the policy to pay to the mertgages is not an assignment of the policy. Its legal effect is that of a direction in advance as to the mode of payment, which, when made, is performance in the manner agreed

to by the insured. Id.

15. In an action on such a policy in the name of the incurrd, if the incurer has paid the insurance-money to the mortgages, he may plead such paym as performance, and the rights of the mortgagee can be protected, and the insurer obtain indemnity against a subsequent suft by the mortgages by the payment of the money late court. M.

III. Marine Invarance.

16. In all contracts of marine incurance there are certain implied conditions which are of the same force as if written in the policy, and are distinguichable from mere representations. Lectch v. Athentie Mat. Inc. Co., 532.

17. Among these conditions, in case of an incurance on cargo, is that it shall be stowed in a safe and proper manner and in the usual and oursemary place for the carriage of goods of the kind issured. Any breach of this condition by which the risk is varied and the perils increased avoids the policy.

18. Gold being stowed in the roar of the vessel under the cargo, and the testimony being clear that that was not the oustomary place and was a place of greater hazard than the cabin, where coin is usually stowed, the judge should have directed the jury, as a matter of law, that that was a moriation of the risk. Id.

IV. Life Insurance.

19. A policy of insurance taken on the life of a husband for the sole use t his wife, and psychio to her or her assigns, is a class in action of the wife's, which she has the right to assign or otherwise dispuse of with her husband's consent. Whitridge v. Barry, 839.

20. The signature of a frue covert to the assignment of a policy of insure effected for her sole use, made with the consent of her husband is sufficient without his signature. But whatever the nature of the transfer, from reg to the interests of husband and wife, it must be made with the consurred

of the husband, express or implied. H.

21. A policy of insurance was taken on the life of a husband for the o so of his wife, and payable to her or her assigns. The wife, influenced by the importantly of her husband, amounting to d urbos, attached her eignati to a blank printed form not attached to the policy, wit or date, or designation of the policy, and with no direction from her as to filling the blanks or delivery of the assignment or policy. B. havis advanced to the husband certain premiseery notes to a large a he had finally to pay, upon the faith of the hashand's securing analysment of policies of insurance and other property, the hashand and other property, the hashand and other property. to assignment to be filled up with a transfer of the policy afe and delivered this assignment and subsequently also the policy itself to B. Upon the death of the husband, in a contest between the wife and the assignment B. (for the henefit of creditors), as to which was contitled to recover on the policy, it was held, 1. That B.'s assignee could claim no greater right than B. held in the policy; 2. That the wife was contitled to recover. M.

22. Insanky, whereby all power of self-will is lost, will occurs the act of

Insurance.

pleide, and prevent the avaidance of a life insurance policy. Hathaway's Ada'r v. National Life Inc. Co., 684.

33. A policy of life insurance which stipulates for the payment of an annual promism is not an insurance from year to year, but the promisms constitute s annuity, the whole of which is the consideration for the entire assurance for life. New York Life Inc. Co. v. Statham, 724.

94. But the time of payment in such policies is material, and of the essence of the contrast; and failure to pay involves an absolute forfeiture, which

cannot be relieved against in equity. Id.

25. If failure to pay the annual premium be caused by the intervention of war between the territories in which the incurance company and the assured respectively reside, which makes it unlawful for them to hold intercourse, the policy is nevertheless forfeited if the company insist on the condition; but in such case the assured is entitled to the equitable value of the policy arising from the premiums actually paid. Id.

26. This equitable value is the difference between the cost of a new policy nd the present value of the premiums yet to he paid on the forfeited policy when the forfolture occurred, and may be recovered in an action at law or

suk in equity. Id.

37. The doctrine of revival of contract, suspended during the war, is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive—as where time is of the essence of the contract, or the parties cannot be made equal. Id.

28. The average rate of mortality is the fundamental basis of life assurance and as this is subverted by giving to the assured the option to revive their policies or not after they have been suspended by war (since none but the sick nd the dying would apply), it would be unjust to compet a revival against the company. K.

INTEREST. See Usuay.

1. Under the Ohio statute, parties may stipulate in a note for any rate of interest not exceeding 8 per cent. per annum, and such note, after meturity, without an express agreement to that effect, will continue to bear the stipulated rate until payment. Marietta Iron Works v. Lattimer, 192.

2. A judgment taken on such a note for the amount due, including napaid interest, will bear the stipulated rate of interest only, without rests, until pay-

8. A special rate of interest continues under the Ohio statute after the time

agreed upon has expired. Monnett v. Storges, 194.

4. Where a party agrees, by note, to pay a certain sum at the expiration of a year, with interest on it at a rate named, and does not pay, it bears interest not at the specified rate but at the customary or statute rate. Burn-Mori v. Firman, 194.

5. If, however, the parties calculate interest and make a settlement upon the basis of the old rate, and the debter gives new notes and a mortgage for the whole on that basis, the notes and mortgage are, independently of the Bonkrupt Act, and of any statute making such securities void in lete as userious, valid securities for the amount which would be due on a calculation properly made. They are bad only for the excess. Id.

INTERNATIONAL LAW. See Constitutional Law, 88; Government; Incumance, 23-20; War, 1, 4.

INTERPLEADER.

Where a bill of interpleader is filed, the holder of the money cannot cities part of it. Cognical v. Armstrong, 444.

ENTOXICATING LIQUORS. See Constitutional Law, 14, 15; Con-

on the charter of a municipal corporation gives the enumen tour power to Meenes inne and severne, and also power to Meenes wholesale Ngast INTOXICATING LIQUORS.

dealers, liquor cannut be sold by the quart without license, in violation of a city ordinance. Roberson v. Lambertville, 124.

2. A complaint which charges that the complainant had just cause to sucpoct, and does suspect, that the defendant is guilty of violating the city ordinance, without averring that he is guilty, is not made with such renumehie certainty as to be the ground of a judicial determination, conviction and sentence. Id.

8. Upon indictment for relling intoxicating liquor to a minor, it does not matter that the defendant did not know that such person was a minor. For-

mer v. The People, 101.

- 4. Roothke was sucd for beer furnished by defendant in error, a corporation located in Milwanker. The beer was sold after verbal negotiations with an agent, carried on at Roethke's store in Seginew City. The jury found the transactions were sales and not agency. Part of the beer was sent under the Saginaw City negotiations, and the sale was held by the court below to have been void under the Michigan liquor law. The remainder was sent from Milwaukee on separate orders, held to be valid foreign contracts: Ifold, the as the verbal agreement made in this state was not sufficient under the Statute of France to cover future orders, and as those therefore stand on their own merits, and the sales and shipments were in Milwankee, the railings on these were correct—as there was a contract made there which would have bee valid at nommon law, and which must be presumed to be valid, under which these latter sales were made. Ruchke v. Brusing Ca., 444.
- 5. The court below refused to allow the money paid for the unlawful pu chases to be set off against the demand in suit for the rest: Links, that this was error. M.

INTOXICATION. See Criminal Law, 9.

JOINT DEBTORS. See Acriou, 3, 4; Equity, 14; Limitations, 2.

JOINT TENANT. See VENDOR, 9.

When one of four joint tenants makes a mortgage of land conveyed to the four, on a bill filed to foreclose the mortgage, it is not necessary to make the three who do not join in the mortgage, parties defendant to the bill. Shake v. *Bool et us.*, 251.

JOINTURE. See Hubband and Wife, 9-12.

JUDGMENT. See Constitutional Law, 11.

1. As a general rule, none but parties to a judgment can have it set aside. Din Inc. Co. v. Aldrich, 251.

2. But where the nominal party to an action is not the real party in interest, he latter is treated as having a standing in court, and may have control of the action. Id.

3. A party is not chargeable with lacker for falling to give a supercedent

bond on suing out a writ of error. Id.

4. If a jurigment is rendered against a corporation, the proceeding, if regular in other respects, will not be vitleted by a more mis-recitation of the near of the corporation. Wilton Co. v. Humphrey, 319.

JUDICIAL BALE. See Soundry's SALE.

JUNOR. See MUNICIPAL CORPORATION, 2.

STICE OF THE PRACE.

Great allowance must be made in the proceedings of Justices of the peace for their ignorance of legal phrasoology. Wilton Co. v. Hungdrey, 819.

LANDLORD AND TENANT. See Accor, 4.

1. A solute of property as abandoned by the United States military anorities, exempte a lessee from paying reat to the landlord during the th of such scisure. Harrison v. Myer, 665.

2. Under the Landlord and Truent Act of Illinois, a landlord has no lien upon the personal property of his tenant prior to an actual lavy of distress.

LANDLORD AND TENANT.

8. If proceedings of bankruptcy are began by other persons against his enant before such warrant of distress he actually levied, the subsequent seignment in hankruptcy will vest the personal property of the tenant in the saignee, to the exclusion of the landlord's right to lavy on it. Horgan v.

4. A covenant by a leaser for quiet enjoyment is a covenant that the leases shall not be rightfully disturbed in his possession and enjoyment during the term, not that he shall not be disturbed at all. Underwand v. Birchard, 58.

S. In an action on a lease it is a good defence where the lessor was to remain on the land with the lessee, that the lessee was "inferted with a loothsame, contagions and infections disease." Linguis v. McFudia, 810,

- 6. N. leased to G. cartain property to be used as a distillery. As a proliminary to its use it was necessary for the lesses to file with the United States collector the written consent of the lessor as the owner in fee of the property, in secordance with sect. 8962 of title xxxv of the Revised Statutes. The meer having refused to give such written consent, it was held, let. That the cross was discharged from all obligation to pay the rent—the default of the court amounting to " constructive eviction." 2d. That the obligation of the proce to give his consent was to be implied as a necessary incident to the lease. Grahenherst v. Nicodessus, 201.
- 7. A claim for rent is not assignable as between more Joint occupiers. Corper v. Polmer, 202.
- 6. A purchaser of grain from a tenant, with knowledge of the landfurd's Hen on it for rent, will be liable to the landlord for the rent due, to the extent of the value of the grain purchased by him. Pretigman v. Unland, 366,

Language.

Where a statute of the state requires publication in a "newspaper," in the absence of any provision to the contrary, a paper published in the English language is understood as intended. Cincinnati v. Bickett, 801.

LEASE. See LANDLORD AND TENANT.

LEGAL TENDER NOTES. See Equity. 18.

United States treasury notes are a trust tender apon contracts etipulating for the payment of money generally. Longworth v. Mitchell, 668.

See Kyrdence, 11.

Whother an alleged libel is a privileged communication, is a question for the Jury. Corpenter v. Bailey, 021.

LECENSE. See Covetitutional Law, 15; Hawkers and Pedlers.

LIGHT. See BASSEST, 1-7.

LIMITATIONS, STATUTE OF. See Complict of Laws, 2, 8; Verdor, 18.

1. An ordinance provided that the owners of lots on which assessments were made should pay within twenty days from the date of the ordinance, or be subject to the interest and penalty allowed thereon by law. I leld, that an action to enforce the lies of such assessment within six years after the expiration of said twenty days, is not harred. Roynolds v. Green, 743.

2. A portial payment on a joint and several promissory note, by one of several makers, will not prevent the running of the Statute of Limitations as to the other maker. Itemer v. Heir, 189.

8. The more payment of interest on a single bill barred by the statute, will be no such premise as will support assumptit for the amount due on the raise no such premise as will support assumptit for the amount due on the single bill. Nothing less than an approx premise will be sufficient. Lesnard gblett, 50.

4. In accumpant on an express pression, the single bill may be given in idease as inducement to the express premise. Id.

5. A married weman who executes a mortgage of her land with her husnd, is not seved by her coverture from the running of the Statute of Lim-

Stations against her title in favor of the mortgages. Hanford v. Fitch, 68.

6. Where the plaintiff was induced not to commonre a said to recover his claim by the defendant's asymptoms to refer to arbitration the defendance.

LIMITATIONS, STATUTE OF.

were estopped from setting up the Statute of Limitations. Devis v. Dan.

7. As to sect. 18 of Code of Kansas, see Young v. Wheticala'l, 314.

LOCAL OPTION LAWS. See Constitutional Law, 14.

MALICIOUS PROSECUTION. See SET-OFF, L.

1. The true inquiry in an action for malicious presecution is what the defendant had reason to believe and did believe were the facts. Gallaung v.

Burr, 190.

2. The institution of a criminal prosecution for the recovery of a private claim is strong, if not conclusive evidence of malice; if this is the metive. the advice of counsel is no protection. M.

3. To recover special damages the declaration should not out with pastionlarity the causes which produced them. Manfield v. Phillips, \$14.

4. Evidence of special demages can only be given where they have been properly averred in the declaration. Id.

S. In such an action, punitive damages can be resevered. Me Williams v. *Ji*oban, 315.

8. The police annals of the city on which the plaintiff's name was entered are not admissible evidence against the defendant, unless these was some low requiring such a record to be kept, or unless the plaintiff was preshow hy proof that the defendant knew that the name of the plaintiff were be so entered as the consequence of the charge of their brought against him. Garrey v. 11'agran, 362.

7. Where the court has rejected a prayer defining malies because it was

incorrect, it is not bound as more mate to give any definition of it. Id.

8 Probable cause does not depend on the assument state of the case in perfect, but upon the honest and reasonable belief of the party community. the procession. Harphum v. Whiteeg, 448.

9. Majice does not monn spite or hetred, but mother entires, as denoting that

the party is actuated by improper and indirect motives. H. 10. It is error, in an action for mailclous prosecution, to permit witnesses to rehears the testimony given before the magistrate by witnesses other than the defendants. John v. Bridgman, 886.

11. A witness, however, who was present can prove that no evidence in

support of the criminal charge was given by the defendant. M.

MALPRACTICE. See Action, 2.

MANDAMUS. See Municipal Corporation. 18.

MARITIME LIEN. See Admiralty, III.

MARITIME USAGE. See Adminalty, 12.

MARRIAGE. See Husband and Wife, L.

MARTER AND SERVANT. See Courty.

1. A malicious accoult by an employee of a railroad company, authorized g approved by them, constitutes a case for exemplory demaged. Minches v. The C., M. & St. P. Reilwog Co., 249.

3. While it is true that a common employer is not responsible to a servent for an injury caused by the negligenes of his fellow-servent engaged in the same line of employment, yet it is the duty of a reliway company as time to provide sele structures, &c., and to adopt such regulations as will be

safety. C. & N. W Railway Co. v. Tugler, 253.

3. An employee on a railroad train continuing for eight months with the same equipment estops his representatives in an action for demages after his death from alleging the equipment to be defective. B. & O. Brillead Co. v.

4. It is the duty of every employer to exercise resconside our in provide his laborers with safe machinery, suitable tools and appliances, adapted to uses for which they are designed. Mallan v. Champlip Co., 813.

e eatire charge of his ba 5. Where a mester places th

laster and servant.

branch of it, in the hands of an agent, exercising no discretion and no oversight, the neglect by the agent of ordinary care in supplying and maintaining ultable instrumentalities, is a breach of duty for which the master is liable. Molian v. Steamship Co., 313.

6. The risk which a laborer assumes of injury from the neglect of his fellow, is when they are co-operating in the same business, so that he knows that the employment is one of the incidents of their common service. Id.

7. Where a servant of a mining company was killed by the folling of a reck from the roof of a common gangway, notice to the superintendent of the dangerous situation of the roof was notice to the company; and if this was long enough before the accident to have given time to repair, the same was sufficient to fix negligence upon the company. Quincy Coul Co. v. Iloud, 445.

6 Where a brakeman of a railway company is injured in consequence of the giving way of a defective ladder, the company will not be lieble, unless it had notice of the defect, either actual or constructive. Tolede Railway Co.

v. Zagrahem, 557.

MERGER. See Conforation, 18.

MILL-DAX

As to Mill Act of 1866 of New Hampshire, see Town v. Finishner, 605.

MISTOMER See JUDGHENT, 4.

A party served with process under a wrong name can only take advantage of it by plea in abasement, and this is so, though he he an infant. Pend v. Ennis, 315.

MORTGAGE. See BANKRUPTCY, 1, 6; HUSBAND AND WIPR, 24, 25; IN-PART, 1,2; JOINT TENANTS; LIMITATIONS, 5; NATIONAL BANK, 1; PAR-TITION; EXCORDING ACTA; USURY, 1.

1. The generality of its language forms no objection to the validity of a mortgage. A mortgage of "the road and property" of a reffrond company

is sufficient. Wilson v. Bogre, 749.

2. A railroad company can mortgage its lands not used for its track or ap-

partenances. M.

8. An unrestricted reference by rule of court of a suit pending upon a mortgage gives authority to the referee, if he finds the plaintiff entitled to recover, to determine the amount of the conditional judgment. Pales v. Homenway, 180.

4. Where the mortgage is conditioned to be void upon the fulfilment by the mortgagors of their obligation to the mortgagos for a life maintenance and other things, the referee should make up the conditional judgment in suc sum as a present equivalent for full performance, including prospective as well as past damages. M.

5. A mortgages of chattels who has expressly fixed a certain time and lace for the payment of the mortgage, makes himself a wrongdoor by seizing the chattels on the day before the day he has fixed for payment. Liester

v. Spracer, 877.

8 Where a mortgage was given to a guardian to occure a doht due his wards, and subsequently a new guardien was oppointed in his place, who, in ignorance of the existence of subsequent ensumbrances upon the property, agreed that the time of payment of the mortgage-debt should be extended, and took a new mortgage on the same property to secure its payment, he without releasing the first mortgage, it was held, that the debt secured by the two mortgages was the same and should have the benefit of the lien of the Arst mortgage. Drury v. Briscos, 868.

MORTMAIN See TRUST, 4.

MUNICIPAL CORPORATION. See ATTORIST, 1; CONSTITUTIONAL LAW, 23; Conforation, 6; County; Danages, 1; Interioating Leguens, 1; Waters and Watercounses, 8
1. Is liable for injury arising from defective highway, although a relived company using the street is bound by its charter to keep it in repair. The

MUNICIPAL CORPORATION.

duty is a public duty and the obligation of it cannot be discharged by contracting with another for its performance. But the primary duty on the railroad company may be considered by the jury in determining the negligence of the city. Warson v. Tripp, 202.

2. A tax-payer is not a competent jurer in actions against a municipality.

3. The corporate authorities of a city hold the public streets in trust for the use of the public. Where the municipality passesses the fee in such streets, although in trust for public uses, it may maintain ejectment against any one whe wrongfully intrudes upon or occupies or detains the property. Where the adjoining proprietor retains the fee, the right to the passessian, use and control of the street by the municipality is regarded as a legal and not a more equitable right. Chicago v. Wright, 816.

4. Equity has no power to enjoin the exercise of the police powers given by law to the officers of a municipal corporation, so as to prevent such officers from preserving the public peace, and from keeping a public street open to

public use. M.

5. A grant in a legislative charter of a railroad of a right to fix its ternines at a point within the limits of a municipal corporation, to be approved by the council, and the subsequent approval of the point of terminus by the council, will not be taken to constitute an irrevocable contract, or to deprive the corporation of its proper and legal control over the use of its streets, unless such is the effect of an express grant or a necessary implication from the charter. F. & P. Builroad Co. v. City of Richmond, 179.

6. It is within the ordinary and implied powers of a manicipal corporation to regulate the kind of vehicles and the speed at which they may be used in

traversing its streets. Id.

7. Courts of chancery have no jurisdiction to restrain the threatened violetion of a municipal ordinance unless the act amounts to a nuisance. Village of R. Johns v. McFierlen, 883.

8. The erection of a wooden building within municipal fire-limits is not of itself a unisance, nor does the fact that it is prohibited by an ordinance

make it so. Id.

9. A city, having power to construct public sowers, and to receive pay from adjoining owners for liberty to enter their private drains into such sewers, is responsible for negligently suffering them to occasion a nuisance, if th nuisence does not result from the original plan of construction, and con avoided by keeping them in proper condition. Rows v. Portaneuth, 718.

16. In maintaining such public sewer, a city is bound to use that degree of care and prudence which a discreet and cautious individual would use if

the whole loss or rick was to be his alone. M.

11. A city will not be liable for injuries caused to individuals, by an electron in such public sewer not placed there by its own efficiels or by an thority of the city government, notil after actual notice of such obstru

or until, by reason of the lapse of time, actual notice may be presumed. II. An assessment for street improvements, when the work is only partially completed, is premature and unauthorized. Cincianut v. S. G. Are use

Ch., 686.

13. The division of a municipal corporation into others or its unner to another does not affect its rights and liabilities. M.

14. Manicipal corporations are created by the legislature from which they derive all their powers, except where the constitution of the state otherwise provides. County Constitutions v. County Countedners, 604.

15. Municipal corporations may not through their officers, but the people are the source of all authority, and it is to this authority they must come at

est, whether immediately or by a circultons process. Barnes v. District of

Columbie, 606.

16. A provision in a city charter gove the power " to Hesnes, tax and regulate and control wagets and other relative scorreying backs in the city; to prescribe the width and tire of the come, the weight of leads to be carried and the rates of carriages." Build, not to apply to the case of wagets und

MUNICIPAL CORPORATION.

by the defendant in the regular course of his business as a merchant, but only extends to wagons of common carriers for hire. Jogor v. East St. Louis, 257.

17. Where specific power is given by the legislature authorising a board of education to issue negotiable bands for school purposes, the regularity of the proceedings cannot be inquired into against a boul fide holder. State v. Board of Education, 857.

18. Mandamas is the proper remedy to compai the board to appropriate

moneye for that purpose, M.

19. If the people of a county vote a subscription in aid of a railway company to be paid in bonds of the county upon certain conditions procedent, I enty authorities cannot delegate power to others to determine when the conditions are performed, but must determine that fact themselves. Superoisers v. Brush, 857.

MURDER. See CRIMINAL LAW, II.

NAME. See Evidence, 2; Judonest, 4; Michones.

MATIONAL BANK. See Corporation, 26.

1. A national bank has no power to take a mortgage as security for the lean of money, and if it does so, the mortgage is void and proceedings upon 18 will be enjoined. Matthews v. Skinker, 488.

2. Corporations having only the powers expressly given by their charters or the law under which they are incorporated, or such as are necessarily implied, must follow strictly the mode of action prescribed by the law. Al.

3. The National Bank Act not only fulls to authorise, but expressly prohibits the banks from dealing in real estate securities, except in certain specified cases to secure delite previously due. Id.

4. A person paying more than the legal rate of interest to a national bank cannot have it applied as a payment of so much of the principal, in an action brought two years afterwards. Iligity v. First National Bank, 501.

5. In such case the rights of the parties are not affected by the state usury

- laws. M.

 6. The New Hampshire statute, subjecting the surplus capital of banking to mational banks. First National Bunk v. Peterborough, 501.
- 7. Such taxation of the surplus capital of such banks, is not prohibited by Congress, and is not an encroachment upon the constitutional powers vested in the Federal government. M.
- 8. The states can exercise no control over the national banks nor in any wise affect their operation except in so for as Congress may see proper to per-
- mit. National Bank v. Dearing, 621.

 9. The provision of the Act of Pobrancy 10th 1868, that taxation on national bank stock shall not be at a greater rate than is assessed upon other moneyed capital in the states, relates only to the rate, and does not prohibit the states from exempting any subjects from taxation. Gorgae's Appeal, 622.

 10. The stock of national banks is liable to a subsel tax in addition to the

state tax. Carlisle School District v. Hopburn, 622.

11. In the honost exercise of the power to compromise a doubtful debt, tocks may be accepted in paymous and satisfaction. National Bank v. Nat. Exchange Bonk, 748.

MEGLIGENCE. See Admirality, II.; Common Carrier; Master and Ser-TART; MURICIPAL CORPORATION, 1, 9-11.

1. Demogres for death of plaints f'e husband should include all posuniery sunges either already suffered or prospective. B. & O. Ballroad Ca. v. State, 60.

2. Next of kin may maintain action for death caused by negligance.

Gretenburger v. Harris, 125.

2. In such cases, the reasonable expectation of what the next of kin might have received from the deceased, had be lived, is the proper measure of dat ages. Il.

Meglicence.

4. In an action for injuries to the person of plaintiff's intestate, on his death, although the recovery must be confined to demages of a strictly premiury kind, yet the jury are not held to any fixed and precise rules in estimating the amount of demages (within the statutory limit on that subject), but may compensate all pecuniary injuries, from whatever source they may proceed. Euro v. C. & N. W. Reilang Ca., 254.

S. Where the damages in such an action go to the porests of the deceased evidence of their health and cotate, and of other facts bearing on the probabilities of their needing the services of the dresared, or of their suffering any actual preuniary loss from his death, may be submitted to the jury. M.

8. In such an action, if it were clear from the undisputed facts, that the boy himself, considering his age and intelligence, did not exercise proper care in crossing the track, or that, in view of his tender years, his most guilty of contributory negligence in permitting him to go alone, the trial court might determine, as a proposition of law, that there sould be us reco-

7. But where the circumstances leave the inference of negligence in doubt and the court is unable to say that upon the most favorable construction for the plaintiff which can be given to his evidence, there is nothing to submit.

to the jury, a nonsuit is improper. AL

3. Negligence is the absence of care, according to cirramstances.

delphin, Wilmington & Baltimore Railroad Co. v. Slag-r. 862.

9. The fallure of an engineer approaching a highway, if deager is to be apprehended, to give warning, is negligence per se, to be determined by the

10. One driving a vicious horse along a public road, running side by side

with a railroad, does so at his peril. Id.

11. Negligence in the plaintiff which may have contributed to the injury will not prevent a recovery, when it is slight as compared with the negligance of the defendant. Illinois Central Railroad Co. v. Banton, 316.

12. Negligence to operate as an estuppel must be the prezimate cause of a loss. Brown v. Howard Fire Inc. Co., 446.

13. C, basled to B. a horse, for hire, to convey him from D. to S. R., upon arriving at 5., put up the horse in a proper place, and the next moraing properly watered, sed, and eared for her, and left her, intending to return, and in fact returning, within a suitable time to care for her, but having resson to apprehend that A., sixteen years of age, would attempt to wat the horse during his absence. A. turned the horse loose to water her, and the horse in consequence thereof became lamed. Hill, by the court sittle for trial without a jury, that these facts showed no evidence of lark of end nary care and prudence on the part of B., and that he was not Mable to C. for the damages. Chese v. Boody, 125.

14. The defendant was driving through a city street in the evening, on the right hand side of the street, at a moderate speed, and in passing a team standing on the same side of the road was compelled to turn into the of the street, and in so doing necessarily occupied about two and a be of the left hand side of the street. In thus passing around the standing to he came into collision with the plaintoff's vehicle which was co him. There was ample room for both teams, but notiber driver dis the other tril the moment of collision, and both the plaintiff and de were using ordinary care. Hold, that the defendant was not liable for the

damage. Etrouse v. Whitelessy, 88.

35 In on action against a reilroad company for burding a house three alleged defective engine, held, that the condition of that engine and on alleged defective engine, held, that the condition of that engine and to management were all that true to be considered. Eres Builday Co. v. Decker,

16 If that engine was properly constructed, the company would not be liable, although the burning was economical by fire continually issuing from

17. Evidence to prove defects in other engines of the company was irrelevent. ii.

MEGLIGENCE.

18. Where fire is communicated from an engine to adjoining lands an from there to others the owner of the latter may sue and the negligenes is not too remote. Railroad Co. v. Bales, 623.

NEW TRIAL. See Errors and Apprais, 4, 6.

FON-RESIDENT. See Constitutional Law, 11-18.

MONSUIT. See Ernors and Apprais, 2.

MUISANCE. See Municipal Corporation, 7, 8.

OFFICER. See Counts, 11; TRESPASS, S.

1. A promise to pay a public officer on extra sum beyond that fixed by law, is not binding, though he renders services greater than could locally have been required of him. Decatur v. Vermillion, 556.

2. If an officer advertises property taken in execution at one place, for sale at another place, and still it accordingly, he thereby becomes a trespassor ab

initio. Everts v. Burgess, 744.

ORDINANCE. See Interiority Liquons; Railsond, 6: Statuts, 9. 10. PARENT AND CHILD.

1. The father is prime facie entitled to the custody of his children, and where he is of good character and able and willing to maintain them, his right is paramount to that of all other persons, except in the single case of an infant of such tender years as to necessarily require for its own good the care of its mother. State ex rel. Lynck v. Brutton, 359.

8. But the father's right is not absolute or unqualified. He may relinquish or forfelt it by contract, by his bad conduct or by his misfortune in being

- unable to give it proper care and support. Id.

 8. Where a father has, through his fault or his misfortune, lost or forfeited his right, and suinequently, by reformation or otherwise, reinstates himself in a pusition to properly care for and maintain his child, his right does not percessarily revive, but a court upon Arbens corpus Will exercise a sound discretion in view of all the circumstances with reference to the welfers of the child itself. M.
- 4. A court will never order a child into the custody of an improper person, but where the child has reached the age of discretion the court will in many cases allow it to make its own choice, even though it should a person whom the court would not voluntarily appoint. Id.

3. There is no fixed age at which the period of discretion is considered to begin. It depends on the capacity of the child to reason sensibly, though as a child, in regard to its condition, its feelings, and its future welfare. A

6. Courts have no juriediction over the religious discipline and instruction of children. Buch motters are proper to be taken into consideration, among other circumstances, in determining the custody of children where it is in dispute, but a difference in regard to religious views does not of itself afford any ground for interference by the court on potition of a father who has lost or forfeited his right of outself, with the person who has acquired such right.

PARTITION.

1. A mortgages of an interest in an undivided estate is not entitled to be

nade a party to a proceeding in partition. Long's Appeal, 60.

2. When partition is made, the security of the mortgage attaches to the

estate held in severalty. M.

8 The mortgages may object to fread or unfairness affecting his tatorest, but if the partition be fairly made he cannot gainery it. Id.

PARTNERSHIP... Roo Barkruptov, 15 ; Billo and Noths, 16, 28 , Formor JUDONEUT | PRAUDS, STATUTE OF, 1.

1. The contract to bankruptry of the estate of an individual partner of a ster espectnership, cannot meintain a sust to recover back meany pro-resty pold to a creditor of the copartnership, upon the ground that the

PARTNERSHIP.

money was paid to such creditor in fraud of the other creditors of the firm, and in fraud of the provisions of the Bankrupt Act. The suit should be by the assigned of the partnership. Amsinck v. Bean, 253.

2. The mere fact that one partner allows the other to manage the partner-chip assets apparently as if they were his own, does not of itself dissolve the

partnership. M.

3. In an action on a note, made by defendants in their firm name and for a partnership debt, they cannot offset an account against plaintiff in favor

of another firm, now owned by our of the defendants. When y. Reals, 190.
4. Where a partnership and the several members of the firm are insolvent, and there are no partnership funds for distribution among its creditors, the greditors of the firm are entitled to share equally with the greditors of such partner, in the distribution of his judividual assets, the amount so distributed to the creditors of the firm, however, not to exceed the amount of their claims. Breck v. Batrman, 214.

5. The subject of distribution of individual and firm assets among craditors. discussed. M., note, 216.

6. The separate property of such partner is alike liable to execution with he property of the partnership, and equity will not ordinarily interfere. Lowis v. United States, 678.

7. Partners are liable in solide for the torts of one, if the tort is committed by kim as a partner, and in the course of the partnership business. Leamie

T. Burker, 316.

3. When a share in the profits merely constitutes a part of the compense. tion received, it does not create a partnership. Burton v. Gendepred, 314.

9. In an action for an account, it is not error for the court to submit to one jury the question of the terms and duration of the partnership, then to refer to a referee to state the account between the partners, and finally to submit to a second jury the claims for damages. Carlin v. Donogan, 317.

10. The obligation of one partner to another is the exercise of good faith and of ordinary care and previence. M.

11. The members of an iuncivent firm are not entitled to the statutory exemptions out of the partnership property after it has been seized in execution by partnership creditors, notwithstanding all the members join in demanding the exemptions. Gaglerd v. Imhoff, 477.

13. If notes are given bond fide by a liquidating partner and the proceeds applied to payment of firm dobts, the other partners are liable. Liqui v.

Thomas, 624.

PARTY-WALL. See EASEMEST, 9, 10,

PASSENGER. See RATLEGAD.

PATENT. See BILLS AND NOTES, 1.

PAYMENT. See Application of Payments; Compederate States, 5.

1. A payment by a debtor to an administrator duly appointed in valid, and a bar to a second action, although the supposed intertate is alive at the time and the letters of administration are subsequently revoked for this reason. Restriges v. East River Sering Institution, 205.

2. Although serrogate courts are of Hustod and special jurisdiction, which depends upon the existence of certain facts, yet their decision upon the existence of each facts and their consequent jurisdiction is conclusive until requierly reversed or vacated, and will protest all imposent parties unting on the falsh of it. Id.

3. Where a party accepts a deed in payment of a debt, and resolpts the same, in ignorance of the fact that the deed is a mulity, there being no such property in existence as it assumes to convey, this will be no payment, and he will not be concluded by his receipt. Andrews v. Arrestend, 254.

You XXIV.—99

PLEADING. See Contract, 1; Equity, 8; Husband and Wife, 11. The replication de injuria is only allowed where the plea is in excuse, and not in denial of the cause of action. Ruckman v. Rastroad Co., 126.

POWERS.

As a general rule a power to sell and convey does not confer a power to mortgage. It depends on the peculiar circumstances of the trust and the intention of the parties. Typon v. Latrobe, 446.

PRACTICE. See Errors and Appeals, 1.

PROBATE COURTS. See PAYMENT, 2.

PROSECUTING OFFICER. See Attorney, 8.

PUBLIC SCHOOLS. See INPANT, 3, 4.

1. It is the right of the directors of the public schools to prescribe the hours of attendance of the pupils, and to make a proper system of panishments for absence, &c. Ferriter v. Tyler, 870.

2. This rule applies to the attendance of the children on public or private religious worship on week-days during the prescribed hours for school. M.

PUBLIC USE. See Constitutional Jaw, 80-32.

Where a long acquiescence in the use of a plat of a village as a public park was shown, it was held, to be a dedication at common law to the public use. Village of Princeville v. Auten, 188.

PURCHASE. See Computational Law, 36.

QUO WARRANTO.

Where a person holds the office of prudential committee of a school district, the writ will be denied when it appears that the petitionee was elected without objection, upon the mistaken understanding of the voters that there had been no election upon a prior balloting, although it turns out that in fact another erson was elected, who, at the same meeting, being ignorant of his election, disqualified himself from holding the office by accepting another incompatible therewith, and that all the voters acquiesced therein. Cute v. Furber, 686.

MAILBOAD. See Common Carrier, 6; Constitutional Law, 83; Con-PORATION, 2, 5, 6; FRECE; MASTER AND BERVANT; MORTOAGE, 1; EBGLIGENCE, 6, 9, 10, 13-18.

1. If a passonger is in the exercise of that degree of care which may reasonably be expected from a person in his situation, and injury occur to him, this is prime from evidence of the carrier's liability. Railroad Co. v. Politre,

2. Whether a passenger in a rail-car by standing up in it, at the close of the journey, but before its actual stoppege, is guilty of negligence, is a ques-

tion for the jury. M.

8. Where the plaintiff is driving on a horse raliway track whou a our is appreaching from the opposite direction, it is his duty to turn off the track to avaid a collision, and if he does not do so, he cannot recover against the railway company, even if the latter was also in fault. Chicago W. D. Railway Co. v. Bort, 258.

4. Negligence on the part of a railroad company in permitting fire to seape from its engines may be shown wholly by circumstantial evidence. Infraed Co. v. Bake, 622.

8. Whether the speed of steam car in a city is safe and prudent is for the

Pennsylvania Hallrond Co. v. Lawis, 623.

6. The speed of trains through towns may be regulated by ordinance. M. 7. A palace or elecping-car is not an inn, nor is the company owning it bject to the responsibilities as to traveller's bargage of an innkesper at momen law. Pulman Pulace Car Co. v. Smith, 98.

8. A traveller, who was being transported by a railroad company, to whom to had paid a fore, took a berth in a eleeping-car attached to the train, but to be a different company, for which he paid an extra sum to the eleep-ng-car company. While asleep he was robbed of a large sum of money he

BAILROAD.

carried in his pocket. Held, that the sleeping-car company was not Hable, either as an innkeeper or as a common carrier. Pulman Pulses Car Co. v.

9. Conductors have a right to eject passengers from cars for non-payme of fare. Jerome v. Smith, 697.

REBELLION. See Captured and Arandonus Property: Comprehenance STATES; CONFISCATION.

RECEIPT. See Insurance, 1, 2; Payment, &

BECORD. See Ennous AND APPRAIS, 5-7.

RECORDING ACTS. See BANKBUFFCY, 17.

Under the statutes of Pennsylvania, recording the assignment of a most gage is notice to a subsequent assignee. Proper's Appeal, 125.

RELIGION. See Crurch, 4; Parket and Cuild, 6; Public Schools, 2. **EEMOVAL OF CAURES.**

1. Where the papers in a case removed from a state court have been accidentally destroyed and the parties by writing flied admit that the action was removed, &c., the United States court will presume that the citizenship of the parties was such as to give it jurisdiction. Resistant Co. v. Rumony, 191.

3. When in a case which is properly removed from a state court into the

Circuit Court of the United States, a complainant getting a decree in the sta enert and sending a transcript of it into enother state, sees the defendant on it there, the Circuit Court into which the case is removed may enjoin the complainant from proceedings in any such or other distant court until it hears the care. French v. Hay, 192.

8. Where an application of the plaintiff is pending in a district court of the state, to remove the action into the United States Circuit Court, and the hearing of the application is set by the court for a particular day in the future, is is error for the court to allow the defendant, before that day arrives, and in the absence of the plaintiff and his attorneys, and without any notice to them, to take judgment against the plaintiff, although, upon the pleadings, the defendant is entitled to just such a judgment as he obtained. But where said application is defertive, and ought to be overruled, and is eventually overruled, and where the plaintiff, who is in default for want of a reply, afterwards moves the court to varate said judgment, but does not offer to file a reply, and makes no such showing as would entitle him to file a reply, and where the judgment is correct upon the pleadings in the absence of a reply, and the court overvoles the motion to vacate the judgment: [fold, that the errrr of the court in rendering the Judgment is new immeterial, and therefore

the judgment will not be disturbed. Cooper v. Conden et al., \$17.

4. Under the Act of Congress of May 24 1907, the picturiff, to remove on action from a district court of the state to the United States Cloudt Court, must make the affidavit himself. M.

5. Under the Act of March 24 1875, a cause will not be removed unless the petition for such removal he filed in the state court before or at the term at which said come could first be tried, and before the first trial thereof. But petition will not, therefore, be entertained, when filed in the state court as a vertict in the cause has been rendered, netwithstanding the ver have been set aside for error and a new trial ordered. Chandler v.

REPLEVIN. See Evidence, 12.

1. A husband gave a chattel mortgage upon a span of horses in use on his wife's farm, and absconded. The mortgages, without making any demand for them, replevied them for breach of the condition of the mortgage, Heli, that the more presence of the horses on the form did not make the wife a i that the mortgages was bound to present his clair before he could learfully subject her to the costs of a suit. Compiell 7. Q

the lightless of alliants in soulcole band.

RES ADJUDICATA. See FORMER ADJUDICATION.

MPARIAN OWNER. See Alluvion: Waters and Watercourses.

See VENDOR AND PURCHASER: WARRANTY.

1. What was held merely an executory contract, notwithstanding the use of words implying a completed sale. Elgen Catton Cases, 117.

2. Damages for refusal to accept goods made to order, diseased. Note to

Shawkon v. Van Nest, 160.

3. In the case of warehouse receipts there is an exception to the rule that to affect subsequent purchasers without notice, and creditors, there must be an actual delivery of personal property. Broudedl v. Howard, \$50.

4. Delivery is the most significant fact to prove transfer of title, but it is not conclusive; parties may agree that title shall not pass until the measurement be made to determine the amount of the price to be paid. Willinson v. Ibiliday, 624.

3. Delivery is a question for the jury. Id.

BALVAGE. See Abutratty, 18.

BCHOOL. See Public School.

SET-OFF. See INTOXICATING LIQUORS, 5; PARTHERSHIP, S.

1. The claim in a suit for malicious prosecution is not the subject of effect m a suit subsequently brought upon a contract, in violation of which the former suit was brought. Sampson v. Warner, 667.

2. In Kansas any cause of action arising from contract, whether it be for liquidated or unliquidated damages, may constitute a set-off. Steress v. Able,

3. The debts which may be set-off against each other at law or in equity,

must be in the same right. Symmon v. Kimbell, \$50.

1. In the ordinary course of business, funds deposited with a banker become his property and constitute an ordinary debt payable on demand in instalments at the depositor's option, and the subject of set-off, but sandie, if they were deposited with him as treasurer of a corporation the funds would be held upon a trust and not subject to set-off. Id.

5. Where an insurance company has funds on deposit with a banker and becomes insolvent, he may set-off his losses on property insured by the com-

pany, M.

SHERIFF.

The sheriff's return of service on original process does not, in Illinois, Import absolute verky, but is only prima facie evidence. Sibert v. Thorp, 302.

SHERIFF'S SALE. See Truet, 6; Vendor and Purchaser, 1.

1. In an action against a purchaser at shorld's sale refusing to comply with the conditions, for a difference of bid at a second sale, the suit must be in the name of the sheriff. Freeman v. Hushand, 127.

2. Where there has been a change of conditions at the second sale the purchaser is not liable for such difference. Id.

3. Where land was represented by the sheriff as unencumbered, when in fact it is, and the plaintiff in the execution buys it in, this will afford no ground for setting aside the sale and satisfaction, as the sheriff is not the agent of the defendant. Venecopes v. Kimler, \$59.

4. Where a judicial rais has been made on void process, the court may, while the purchase-money remains in the hands of the sheriff, on the application of the purchaser, set aside the sale and order the purchase-money to

be refunded. Dowell v. Goode, 180.

S. Any contract entered into at a judicial sale, on the part of the bidders, to prevent competition at such sale, will vitiate it. Wiless v. Kellegg, 448.

SHIPPING. See ADMIRALTT.

1. Where a vessel has selled under a charter-party with earge abourd, the le entitled to not freight for the whole veyage, in accordance with the terms of the charter, though destroyed by on insurgent cruiser, when but one day out. Buck v. United States, 287.

SHIPPING.

at her port of first destination, to be earried thence to a port of final destina-tion, she is extitled to not freight on the earge which she was thus to have taken on board. Burk v. United States, 287.

8. Where destroyed while sailing under one charter to deliver, at a designated port, cargo on board, and to bring other cargo home, she is outlified to

not freight for the round trip. M.

4. Where destroyed while sailing under two distinct and independent therters, to earry under the first, cargo to an intermediate port, and under the second, to carry other cargo to a port more distant, she is entitled to not freight under each charter, though destroyed before the fulfilment of the first, if she has made it satisfactorily to appear by proper proof, or necessary legal presumption, that she entered fairly at the same time on the comme nd prosecution of both voyages. M.

b. The provisions of the Act of Congress of June 284 1874, that the con of Alabama claims shall not allow any claim for uncarned or prospective freights or profits, do not change the foregoing principles of commercial law. M.

6. Repairs at an intermediate port, if necessary, constitute a proper subject of general average. Ilobesa et al. 7. Lord, 667.

7. So are wages of the officers and crew, whether the ship bore away for repairs to a port of refuge outside of her regular course, or whether the necessary repairs were executed in the port where the disaster occurred. M.

ELANDER.

1. Where the plaintiff, a partner, said of the defendant, his co-partner, "He is a swindler and thief, and stole \$8000 from me:" Ilold, on domurrer,

1. That the words recited, unqualified by averments, are actionable per se, as they charge a crime. 2. That if it appeared from the complaint that the words were spoken and understood merely as charging that plaintiff had made false entries in the account books of the firm, and in that manner alone had stolen from the defendant, the words would not be actionable per as and the complaint would be had for lack of an averment of special damage. Stern v. Katz, 255.

2. In the absence of any statute making fernication indictable, words imputing sexual intercourse to a woman are not actionable in themselves, unless be is married, and a declaration which does not aver that she is married, falls

to set forth any cause of action. Pollard v. Lyon, 283.

3. The averment that thereby the plaintiff was "damaged and lajured in her name and fame" is not a sufficient averment of special damage. M.

4. To support an action of slander the words must be: 1. Words which impute the commission of some criminal offines involving moral turpits for which the party, if the charge is true, may be indicted and punished.

2. Words which impate that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society. 8. Words which impute to the party unfitness to perform the duties of an office or employment of profit, or the west of integrity in the discharge of the duties of such an office or employment. 4. Words which projudies such party in his or her profession or trade. 8. Words which, though not in themselves actionable, essarion the party special damage. A

SPECIFIC PERFORMANCE. See Equity, 10: Version, 9. STAMP.

1. The went of a stamp on a note is no evidence of want of consideration Long v. Spencer, 448.

2. The Internal Revenue Act merely made the want of a stamp a disqualification of the instrument as evidence. It.

STATUTE. See Constitutional Law, 14, 40, 41.

1. In constraint a statute, the punctuation is cutified to small constant. Morrill v. 7% State, 192.

2. Whonever a logislature has used a word in a statute in one sees the equality use the some word in logislation on the tame subject-a there things being equal, it will be understood as using it in the same but v. Woodford, 318.

Statute.

- 3. Though the statement of facts in a preamble to a statute is not evidence as against a party whose rights are affected without his consent, yet where the legislature does an act within its powers, a statement of its reasons in a preamble will not affect the validity of its act. Lathrop v. Madman,
- 4. A statute repealing a charter at a certain dute, provided that the commay shall make up a deficiency in its assets before that date, then the charter hall remain in force, and appointing a special tribunal to determine whether she deficiency is made up or not, is not a delegation of logislative power and is valid. A statute may be passed to take effect on the happening of a fature event. M.
- b. The meaning of a statute must be ascertained by a reasonable construction of its provisions, and not one founded on more arbitrary conjecture.

 Conflux v. The State, 447.

 6. No man incurs a penalty unless the act which subjects him to it is clearly within both the spirit and letter of the statute. M.

7. Reference to legislative journals for interpretation of. Blake v. No-

tional Bank, 502.

8. Where a legislative act contains two sets of provisions, one giving speeific and precise directions to do a particular thing, and the other in general terms prohibiting certain acts which would, in the general sense of the words used, include the particular act before authorized, then the general elause does not control or affect the specific enectment. State, Bartlet proc., v.

Trenton, 127.

9. Where an ordinance is confused, yet if, by careful reading, aided by a map, it is intelligible, it will not be avoided for uncertainty. Effect murt be given, if possible, to all ordinances regularly passed, and within the powers

conferred by the charter. State, Boice proc., v. Plainfield, 127.

10. Where an ordinance is annulled for want of jurisdiction by competent notice to the persons affected, the error is fundamental and cannot be remedied by subsequent legislation. Id.

STREAM. See WATERS AND WATERCOURSES.

STREET. See MUNICIPAL CORPORATION, 1, 3-6, 12.

SUBBOGATION.

Subregation in equity is confined to the relation of principal and surety, and guarantors, and to cases where a person, to protect his own junior lien, is compelled to remove one which is superior, and to cases of insurers paying losses. Bishop v. O'Conner, 258.

SUNDAY. See Bills and Notes, 12.

SUBSTY. See Executor, 1; Guarantt; Trover, 1.

1. The plea of sureties upon a collector's bond that it is not their deed, is well maintained by proof that subsequently to its delivery, and without their knowledge or consent, but with the knowledge and consent of the selectmen of the town having custody of the bond, the penal sum was changed by the principal from twenty-five hundred to twenty-five thousand deliars. Dorer v. Behinson, 200.

2. Such an alteration, so made, avoids the bond as to the sureties. It cannot be deemed a spaliation by a stranger. The inhabitants of the town can-

not emistain suit against the services upon a bond thus vitiated. Id.

3. The town itself retifies such permission by inserting in their writ a count upon the bond in its altered condition. They cannot take the chance of respy a beneat therefrom without incurring at the same time a rick of loss.

4. To enable a surety who pays a dobt to recover the amount of the prineipal, both principal and surety must at the same time be legally hound for the Hollingia v. Ritchey, 60.

3. As a rule of law, complete fairness is due from the creditors of a delaw to one about to become surety; but this rule will not excuse the person about

SURETY.

in become surety from reasonable diligence to inform himself as to the prodence of the act he is about to do. Aledana v. Bosse, 61,

RURROGATE COURT. Nee Pathent. S.

TAXATION. See Constitutional Law, 30; Equity, 10; National Baur, 6-i0.

1. Limitations on Taxing Power arising our or the Situs of Pro-PERTY, 65, 129.

2. Linitations imposed by the Constitution of the United Status, on the Taxing Power of the Status, 625, 666.

3. A claim of exemption from taxation whether state, county or municipal, must be founded on clear intention of the legislature; negative language is not sufficient. Bailey v. Maguire, 127,

4. Lands held by trustees for a church, do not constitute a part of the endowment or fund" of a religious society, and are not exempt from taxa-

tion. State v. Krallman, 128.

5. As to tax on corporations for internal revenue, see Make v. National Benk, 502.

TELEGRAPH. See Evidence, &

TENANT IN COMMON. See VENDOR, 9.

TIME. Res COVENANT, 2, 8; INSURANCE, 24; VENDOR AND FURGRAMER, 10.

TITLE. See BAILMENT, 1; EXCHANGE.

1. The owner of a chattel cannot, spart from legal p. seess, he divested of his title to it, except through some unlawful or improvident act of his own. The transfer of possession to another without more is not each act. Quinn v. Daris, 319.

2. The transfer must be accompanied by something indicating in the cuttodian a right of property or power of alienation; there must be proof of

language or conduct at least equivocal. Id.

TORT. See MARTER AND SCRYANT, 1; PARTHERSHIP, 7.

TOW-BOAT. See ADMIRALTY, 14, 17.

TRESPASS. See Offices, 1.

1. A justification under a statute for entry on land to build an aquedist must be strictly proved. Faramenth v. Goodhus, 744.

2. In trespose for assault and bettery, the declaration may be emunded so a to include an allegation of unlawful detention or imprisonment. Califf v. Terrio, 116.

3. An execution which recites a judgment only against B., and is issued upon a judgment only against B., is no protection to an officer to levying upon the property of A., although it commands him to soins the property of A. Wilton Town Company v. Ilimphrey, 319.

. TRIAL.

1. When a cause is tried by the court, without a jury, by the coursest of parties, the court is substituted in the place of a jury, and its findings on questions of facts cannot be reviewed by writ of error. Calcula Bridge Ca. T. Gielass, 128.

2. On the trial of a civil action wherein the claim or defence is based on an alleged fraud, the leave may be determined in accordance with the people derance or weight of evidence, whether the facts constituting the alleged fra

do, or do not, amount to an indictable offence. Jones v. Grosses, 344.

8. Courts do not pessons the power to change by instructions the which the plendings present. Iron Mountain Bank v. Armstrong, 788.

4. An instruction that the jury may disregard the testimony of a with who has evern folcoly, concerning any material fact in loose, should not be given. They cannot reject his evidence unless they believe that he has hurwingly testified to an universe. Al., and see Wetzman, 4.

TRIAL.

5. It is not competent, in order to show that a party to a note in suit has authorized the insertion of a clause respecting interest, to show that he was a party to other notes containing similar clauses. Iron Mountain Bank v. Arm*strong*, 783.

4. A witness cannot be questioned in regard to importingut matter in order

to contradict him. K.

TROVER. See BILL OF LADING; EVIDENCE, 18.

1. The relation of suretyship is based on the consent of all the parties. Kenyon v. Woodruff, 844.

2. A recovery for conversion terminates the right to reclaim the property

a. Where parties are jointly guilty of conversion, and judgment has been recovered against one of them therefor, the injured party, by proceeding to enforce collection against him under that judgment, clock to be

alone and bars himself from having recourse to the rest. Id.

4. A deputy sheriff was descived by certain persons into converting preperty for their benefit. Indement was recovered against him for the converion, and he, in turn, sucing them in tort for the damage caused him by their frand, recovered the amount of the judgment obtained against himself. This was held a proper measure of damage. Id.

TRUST AND TRUSTEE. See Caunon.

- 1. B. deposited in a savinge bank certain money in his own name as trustée for B. and gave the bank-book to R., who was his step-daughter; R. returned the book to B., in whose control it remained until his death. In an equity suit by R. against the administrator of B., claiming the deposit as trust funds hold by B. for R.: Ileld, that the trust was completely constituted, and the fact that it was voluntary was no reason for refusing relief. Ray v. Simment,
- 2. Testator deviced to his wife absolutely all his estate, real and personal. The wife died two days after his death, intestate. Bill is filed by testator's heirs and next of kin to set up a parel agreement between testator and his wife, that, at the death of wife, the property was to be equally divided between the two families. Ilele, unless fraud is alleged and proved, no such trust can be set up by perel. Sprinkle v. Ilagareth, 36.

3. The limitation over, being of what was left at death of wife, could not be enforced, even if it had been expressly limited on the face of the will, as such a limitation would be repugnant to the absolute device and void. A

4. Where an absolute estate is devised, but upon a secret trust assented to by the devises, either expressly or impliedly by knowledge and silence before the death of the testator, a court of equity will fasten a trust on him on the ground of fraud, and consequently the Statute of Mortmain will avoid the device if the trust is in favor of a charity. Schults's Appeal, 460.

b. But if the devices have no part in the device, and no knowledge of it until after the death of the testator, there is no ground upon which equity ean fasten such a trust on him, even though after it comes to his knowledge he should express on intention of conforming to the wishes of the testator.

- 6. The simple avowal by a purchaser at shoriff's sais that the purchase was for another, will not support the allegation of a trust. Carbort's Appeal,
- 7. As between trustee and certai que trust, or agent and principal, the trustee or agent cannot take the benefit of a transaction entered into in violation of his duty. Camberland Coal and Iron Co. v. Parrish, 447.

- 8. Transactions between a corporation and its directors are governed by the rule applicable to transactions between principal and agent, do. Al. 9. The burden of proof is upon a party holding a fiduciary relation to establish the parfect fairness of a transaction with the party with whom he holds each relation. Id.
 - 10. Where a tractee has sold the trust property to another, that sale having

TRUST AND TRUSTER.

been judicially confirmed after opposition by the casulque trust, the fact that thirteen years ofterwords he bought the property from the person to whom he cases sold it does not, of necessity, visious his parchase. Market v. Beals'd w., 234.

11. Where a trustee claims compensation for services, he must show that he has discharged the trust; and if the agreement to pay him out of the fund is disputed, he must assablish is by a prependerance of evidence. Jentine v.

12. At comman law, in the absence of a contract, a trustee is cathled to no empensation for the management of the trust property; be may however charge

for all reasonable expenses incurred in earing for it. Maggine v. Mider, 559.

18. Trustees have a right to be reimbursed all expenses reasonably incurred in the execution of the trust; and it is immeterial that there are no provision or each expenses in the instrument of trust. Reneeded & Baratons A Co. v. Miller, 61.

14. Such expenses are a lieu upon the trust property. Il.

ULTRA VIRES. See Chunck, S.

THION PACIFIC RAILROAD CO.

As to the relations of the United States with the Union Pacific Ballren Company, see United States v. Union Peoiste Mailroad Co., 419.

UNITED STATER COURTS. See Comprisonal Law, 87, 30; Course; WAR. I.

USAGE. See Admiralty, 12; Brown, 8; Contract, 12, 30; Mico-

Cannot control the plain meaning of language in a contract. Moreor Mining Co. v. McKee, 61.

USURY. See Bille AND Norms, 14; INTEREST, 8; NATIONAL BANK, 4, 8.

1. Where one purchases land subject to a morigage, which as part of the consideration he agrees to pay, he cannot defend against the mortgage on the ground of usury. Cremer v. Lepper et al., 300.

2. Upon default of payment of interest, interest on interest will be com-

poted at six per cent.

VENDOR AND PURCHASER.

1. A defaulting purchaser at an executor's sale is entitled upon a re-cale

to the surplus processis. Mealey v. Page, 69.

2. Where the intent of a contract for sale of land is clearly to make a sale by the sere, and the contract is in first, the rule is to compel payment of perace-money, according to the quantity. Coupleneur's Adm're v. Stanft, 62.

3. In some eases equity will relieve where the difference in quantity is so

great as to be evidence of gross mistake or fraud. M.

4. When a contract, whether executory or executed, is with reference to an official survey, it will be construed to be a sale according to the quantity stated in it, unless there he express provision for remeasurement, or fraud or such palpable mistake as is evidence of it. Id.

S. Where the contract is executed by deed, or by bond or other security taken for unpaid perchase-money, the rule is not to open such contrast to allow a deficiency or recover for an excess, even if the sale he by the acre. At.

6. The rule that a sale by the acre calls for a survey to fix the quantity,

will yield always to the intent of the parties to abide by the quantity ste in the agreement or referred to in other writings. Id.

7. What is a material fact for the jury. Teabrooks v. John, 128.
8. When there is a mutual mistake as to on ensumbraces on land sold equity received the contract and restores the parties to their former position

9. Where a tenant in common contracts for the sale of the entire la ser who in good faith believes him to be sole owner, on a bill

VENDOR AND PURCHASER.

ention in money for the value of the outstanding interest. Longworth v.

10. Where a party makes an offer to sell on specified terms, giving the respond parchaser the option to accept the terms within a limited period. time is to be regarded as of the essence of the offer, and an acceptance of the terms after the period limited will not be hinding. Id.

11. A party who have land and gives notes for the purchase-money, but gets no deed, but only the vendor's land to convey on payment of the notes, has only an equitable title and cannot convey more. Loris v. Ibackins, 203

13. The discharge of such a purchaser in hankruptcy will relieve him from payment of the notes, but will not give him any further title to the land. M.

13. Statutes of Limitation do not run in such a case. If the notes are not paid the vendor may file a bill for forcelowers. Id.

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2. An honorable discharge of a soldier from service does not restore to him pay and allowances forfeited for desertion. United States v. Landers, 960.

A. Under the term "allowances" hounty is included. Id.

4. As a general rule one of the immediate effects of a state of war is that. mmercial intercourse between subjects of the contending powers is interested. In the United States, however, linenses to carry on trade may be issued by the authority of an Act of Congress, and in special cases by the authority of the President. Matthews v. McSee, 560.

WABEHOUSE RECEIPT. See SALE, 3.

Wabbanty.

1. A covenant against encumbrances is broken by an existing mortgage made by a prior owner, under which plaintiff is evicted, and a subsequent reversal of the proceedings will not affect plaintiffs right of action. Smith v. Disen, 744.

2. The defendant sold plaintiff a horse, warranting it sound, the eyes being ien sure ; «vidence of the cundition of the eyes a year afterwards was admissibie for the purpose of showing that the disease was not temperary, but permanent. Frequent v. Karckt, 318.

2. Evidence however should also have been received to show what was their condition during the intermediate time. Id.

4. Where there is a warranty and no fraud or agreement to return, the vendes cannot resoled the contract after it has been executed; his only remedy is on the warranty. L.

WATER AND WATERCOURSES. See ALLUVION; EQUITY, 1.

1. The right of every riparism owner to the enjoyment of a stream of runalog water in its natural state, is incident to the ownership of the land itraif, nd being a common right, every proprietor is bound so to use the common qually beneficial enjoyment of it by others. sight as ant to interfere with an e

ger of Bakimere v. Appeld, 448. . A riparian owner who apprehends damages from the introduction of an Solel capply of water into the stream may file a bill averring his informaon and bolief upon the facts, and will be entitled to an injunction without

g for account demage. Bl.

3. If a city, in fixing the grade of a street, or in afterwards changing it ease water to flow upon a lot that it did not naturally flow upon, the cit is both Habte charefor. (City of Plannington v. Archael, 200.

WAY. See BASEMERT, 14, 18.

WILL. See TRUST, 2-5.

1. Non-protessional witnesses, who are not subscribing witnesses to a wi may testify to their opinions in regard to the sanity of the testator, when Sounded upon their knowledge and observation of the testator's appearance and conduct. Hardy v. Merrill 630.

2. The party who affirms that a will was dely and legally executed has the barden of proof, and the accompanying duty of opening, and the right to close, no matter in what form the issues for trial may be drawn. M.

WITHESE. See Trial, 6; Will, 1.

1. If a child under the age of nipe years is found, after examination by the court, to possess a sufficient rouse of the wickedness and danger of this essering, he may be swern, and admitted to testify. Day v. Day, 620.

2. In courts of the United States parties to a civil suit (the suit not believe by or against executors or guardinas) may testify by deposition as we

26 orally. Bullroad Co. v. Pollard, 192.

2. What person a witness within the meaning of Bovleed Statutes V. S., 8 300. United States v. Bittinger, 49.

4. When a case is pending in contemplation of said statute. M.

5. Where a firm through an agent enters into a contrast, the person with whom the contrast is made, on his sait against the firm for a branch of the contrast, is a computent witness, although she agent be dead. Spream to Trafford, 219.

6. The rais fidus is use, falus is another, should not be interposed become the witness and the jusy, commanding the jusy to take all or to amundo at all testimony. Makesburger v. Mylin, 800; and see Tuest, 4.

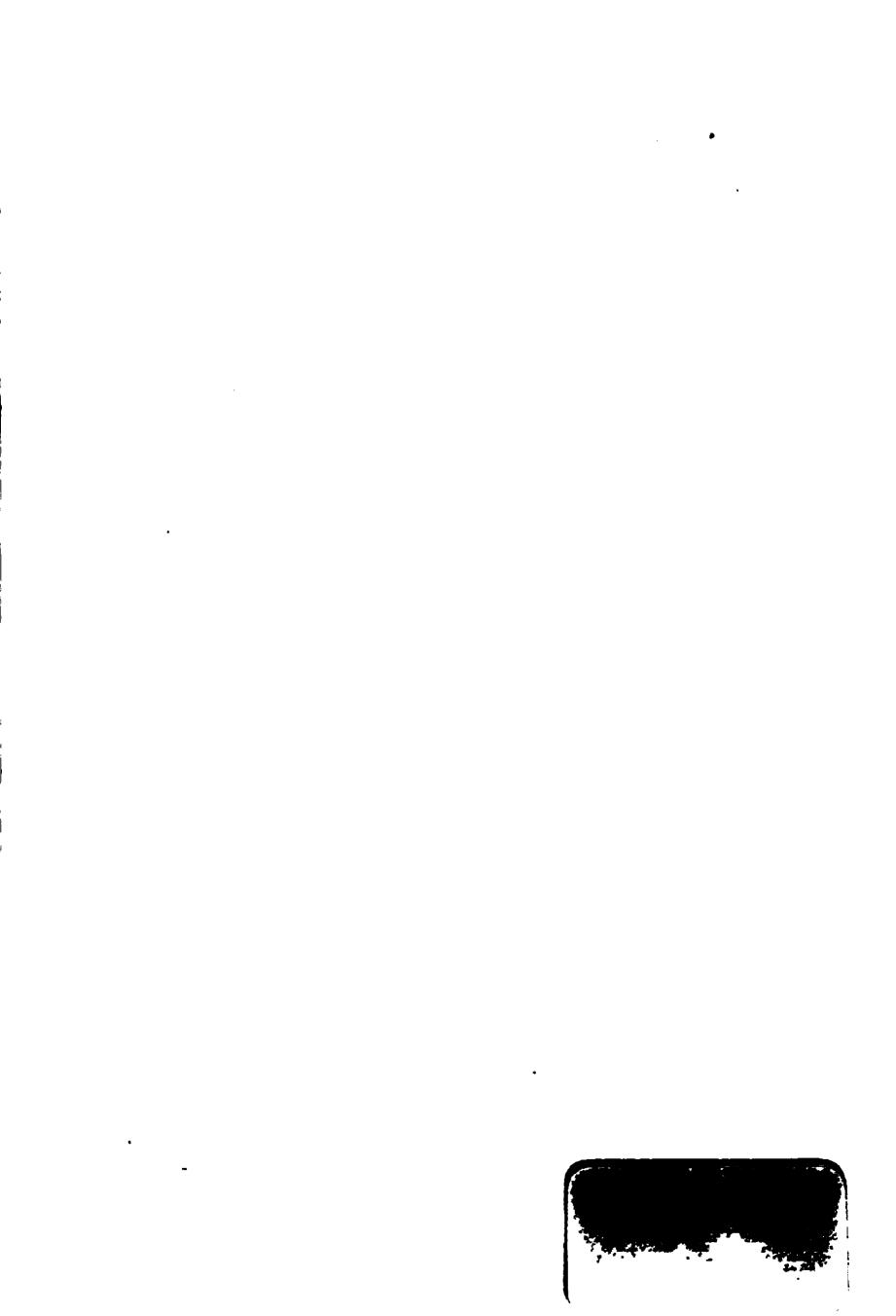
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VENDOR AND PURCHASER.

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is on the warranty. M.
WATER AND WATERCOURSES. See Alluviou; Regists, 1.

1. The right of every riparian owner to the enjoyment of a stream of running water in its natural state, is incident to the ownership of the land itself, and being a common right, every proprietor is bound so to use the common right as not to interfere with an equally beneficial enjoyment of it by others. Morey of Baltimers v. Appeld. 448.

right as not to interfere with an equally beneficial enjoyment of it by others. Moyer of Baklmers v. Appeld, 448.

2. A riparian owner who apprehends damages from the introduction of on artificial supply of water into the stream may file a till averring als information and teller upon the facts, and will be entitled to an injunction without

weiting for esteel damage. Id.

8. If a city, in fixing the grade of a street, or in afterwards changing it, enesse water to flow upon a let that it did not naturally flow upon, she city will be held liable charefor. City of Bloomington v. Bruhan, 200.

WAY. See Basenert, 14, 15.

Will. See Tayer, 2-5.

1. Non-protessional witnesses, who are not subscribing witnesses to a will may testify to their opinions in regard to the sanity of the testator, who founded upon their knowledge and observation of the testator's appearance and conduct. Hardy v. Merril 630.

2. The party who affirms that a will was duly and legally executed has the barden of proof, and the accompanying duty of opening, and the right to close, no matter in what form the issues for trial may be drawn.

WITHEBE. See Trial 6; Will i.

1. If a child under the age of nips years is found, after examination by the court, to possess a sufficient sexus of the wickedness and danger of the

swearing, he may be swern, and admitted to testify. Day v. Day, 600.

2. In courts of the United States parties to a civil suit (the suit out be one by or against executors or guestinus) may testify by deposition as a secretify. Reilroad Co. v. Polland, 192.

2. What person a witness within the meaning of Borland Statutes V. S., § 3009. Finited States v. Bittinger, 49.

4. When a case to pending in contemplation of said statute. M.

5. Where a firm through an agent enters into a contract, the parece of whom the contract is made, on his sait against the firm for a brunch of a contract, is a competent witness, although the agent to deal. Spread Trafford, 319.

6. The rule folias in une, folias is careful, cheald not be interpred between a witness and the jury, commanding the jury to take all or to case also all bid tections. Sheliasterper v. Night, 200; and not Tatab, 4.

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